(1)

91-182

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER 1991 TERM

****

JOSEPH M. WARD

PETITIONER

V

ROY H. PARK BROADCASTING CO., INC. AND ROY HARDEE

RESPONDENTS*

****

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

****

PETITION FOR WRIT OF CERTIORARI

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*See page iv regarding other parties to this action (none of whom have been involved in any of the appeals).

QUESTIONS PRESENTED FOR REVIEW

I. DOES THE TRIAL COURT'S ENTRY OF SUMMARY JUDGEMENT AGAINST THE PETITIONER, BASED IN PART ON ABSOLUTE PRIVILEGE AS TO TWO NEWS REPORTS, AND/OR THE AFFIRMATION OF THE SUMMARY JUDGEMENT BY THE NORTH CAROLINA COURT OF APPEALS,AND/OR THE DISMISSAL OF THE PETITIONER'S APPEAL TO THE SUPREME COURT OF NORTH CAROLINA FOR LACK OF A SUBSTANTIAL CONSTITUTIONAL QUESTION VIOLATE THE PETITIONER'S RIGHT TO BE PROTECTED FROM FALSE DEFAMATION BY THE MEDIA, PURSUANT TO ARTICLE I, SECTION 14 OF THE NORTH CAROLINA CONSTITUTION AND THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION, AND/OR DENY HIS RIGHT TO A CLAIM (S) RECOGNIZED UNDER NORTH CAROLINA LAW AND THEREBY DENY HIM HIS RIGHT TO DUE PROCESS OF LAW AND/OR EQUAL PROTECTION OF THE LAWS, PURSUANT TO THE 5TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

II. DOES THE TRIAL COURT'S ENTRY OF SANCTIONS (INCLUDING $13,450 IN ATTORNEY'S FEES) AGAINST THE PETITIONER FOR HAVING SIGNED AN AMENDED COMPLAINT FOUND TO BE SPURIOUS, WITHOUT FOUNDATION AND A SHAM UPON THE COURT (THE SAME COMPLAINT UPON WHICH THE SUMMARY JUDGEMENT REFERRED TO UNDER QUESTION I HEREINABOVE WAS ENTERED) AND/OR THE AFFIRMATION OF THE SANCTIONS BY THE NORTH CAROLINA COURT OF APPEALS AND/OR THE DISMISSAL OF THE PETITIONER'S APPEAL TO THE SUPREME COURT OF NORTH CAROLINA SEEKING RELIEF FROM THE SANCTIONS DENY THE PETITIONER HIS RIGHT TO DUE PROCESS OF LAW AND/OR EQUAL PROTECTION UNDER THE LAWS, PURSUANT TO THE 5TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

III. DOES THE TRIAL COURT'S DETERMINATION THAT THE PETITIONER HAD RESTED HIS CASE BEFORE HE FILED HIS NOTICE OF VOLUNTARY DISMISSAL, WITHOUT PREJUDICE, OF ALL OF HIS CLAIMS AGAINST THE RESPONDENTS AND/OR THE AFFIRMATION OF THAT RULING BY THE NORTH CAROLINA COURT OF APPEALS AND/OR THE DISMISSAL OF THE PETITIONER'S APPEAL TO THE SUPREME COURT OF NORTH CAROLINA SEEKING RELIEF FROM THAT RULING DENY THE PETITIONER HIS RIGHT TO DUE PROCESS AND/OR EQUAL PROTECTION OF THE LAWS, PURSUANT TO THE 5TH AND 14TH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

Capital-Cities-ABC, Ned Warwick and Willis Talton became defendants in this action at the time the Complaint was filed. On April 11, 1988, the Petitioner dismissed all of his claims against Defendants Capital-Cities-ABC and Ned Warwick without prejudice. That left in place a counterclaim of those defendants, pursuant to N.C. Gen. Stat. 6-21 seeking attorneys fees. The counterclaim has never been resolved. On June 3, 1988, the Petitioner dismissed all of his claims against Defendant Willis Talton without prejudice (thereby terminating the action between the Petitioner and that Defendant).

None of the above named defendants have been actively involved as to the Petitioner's appeals in this action.

INDEX

TABLE OF AUTHORITIES

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THIS CASE BY OTHER COURTS

Interlocutory Summary Judgement against the Petitioner was entered by an Order of Pitt County (N.C.) Superior Court. Sanctions, including $13,500 in attorney's fees, were entered later against the Petitioner by the same court, pursuant to Rule 11 (a) of the North Carolina Rules of Civil Procedure. After the Petitioner appealed, the same court (but a different judge) entered an order dismissing the Petitioner's appeal from the entry of summary judgement as being not in time. The North Carolina Court of Appeals later entered an opinion finding that the Petitioner had entered his notice of appeal from the Summary Judgement in time. That Court deferred its decision as to the appropriateness of the entry of sanctions and remanded the case to allow

the parties to prepare a new record on appeal and briefs on the questions presented. After those tasks were accomplished, the North Carolina Court of Appeals in an unpublished Opinion (not to be given consideration in other cases) affirmed the entry of summary judgement and the entry of sanctions. The North Carolina Supreme Court later issued an Order dismissing the Petitioner's appeal and denying his Petition For Discretionary Review. See Appendix, pp 9-13, 14-18, 19-56.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The Petitioner seeks review of the Order of the Supreme Court of North Carolina entered in this action on April 5, 1991, the Opinion of the North Carolina Court of Appeals entered on February 5, 1991, the Order entered in Pitt County (N.C.) Superior

Court on June 10, 1988 (entering sanctions against the Petitioner) and the Order entered in the same court on January 22, 1988 (entering summary judgement against the Petitioner). No order respecting a rehearing was entered and no order or extension of time to file a petition for a writ of certiorari was entered. The Petitioner believes that Article 3 of the United States Constitution and the 1st, 5th, and 14th Amendments of the United States Constitution confer this Court jurisdiction to review the Orders and the Opinion in question; as do Sections 1981 and 1982 of 42 U.S.C. and Section 1983 of 42 U.S.C. (by providing for relief under its "other proper proceedings for redress" clause.)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The following constitutional provisions and statutes are involved in this case.

(a) The 1st Amendment of the United States Constitution which states as follows:

> Congress shall make no law respecting an establishment of religion, or preventing the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition the Government for a redress of grievances.

(b) The 5th Amendment of the United States Constitution, the pertinent portion of which states as follows:

> No person shall * * be deprived of life, liberty, or property without due process of law * *.

(c) Section 1 of the 14th Amendment of the United States Constitution, the pertinent portion of which states as follows:

> **No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

(d) Article 1, Section 14 of the Constitution of North Carolina which states as follows:

> Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.

(e) North Carolina General Statute 1A-1, Rule 11 (a), the pertinent portion of which states as follows:

> **The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument

> for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. ** If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(f) North Carolina General Statute 1A-1, Rule 41 (a)(1), the pertinent portion of which states as follows:

> ** Subject to the provisions of Rule 23 (c) and of any statute of this State, an action or claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. **

(g) North Carolina General Statute 1A-1, Rule 56 (c), the pertinent portion of which states as follows:

> ** The judgement sought shall be rendered forewith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgement as a matter of law. **

STATEMENT OF THE CASE

(a) Statement of Proceedings:

This action, originally complaining of false defamation and interference with personal property rights, was filed on December 17, 1986. An Amended Complaint was filed February 10, 1987. The Respondents filed their Answer and their Amended Answer in time. The Respondents filed a counterclaim seeking to recover all amounts expended by them in defense of this proceeding, pursuant to N.C. Gen. Stat. 6-21.5. The Petitioner

filed a counterclaim complaining of interference with contract (s). A constitutional issue as to the rights of the Petitioner and the Respondents pursuant to the 1st Amendment of the United States Constitution was raised by the Petitioner alleging actual malice on the part of the Respondents in his complaint. Record, pp 12-14. Appendix, pp 73-74, 76-77 (paragraphs 26,32). The Respondents denied actual malice and pled qualified privilege and "First Amendment" public figure privilege in their Answer. Appendix, pp 119-120.

With discovery still incomplete, pending motions were heard before presiding Superior Court Judge James D. Llewellyn on January 21, 1988. At the hearing, the Petitioner moved that his Motion To Join New Defendants, Motion To Amend Complaint, Motion To Supplement Complaint be heard before the Motion For Summary Judgement of Respondents Roy H. Park Broadcasting Co., Inc. and Roy

Hardee was heard. Judge Llewellyn denied that motion and proceeded to hear the Motion For Summary Judgement. Before he presented evidence or argument at the summary judgement hearing, the Petitioner filed and served a written notice of voluntary dismissal of all of his claims against Respondents Roy H. Park Broadcasting Co., Inc. and Roy Hardee, without prejudice. Judge Llewellyn entered an Order declaring the Notice Of Dismissal invalid. He found that the Petitioner had rested his case as to the summary judgement motion hearing before filing his Notice Of Dismissal. Record, pp 233-237. Appendix, pp 1-8. The Petitioner excepted from that ruling during the hearing on the grounds that North Carolina General Statute 1A-1, Rule 41 (a) allows him to take a voluntary dismissal without order of court at any time before resting his case, thereby raising an issue of due process of law and equal protection

under the laws pursuant to the 5th and 14th Amendments of the United States Constitution. Record, page 237. Appendix, p 8. On January 22, 1988, Judge Llewellyn entered an Order granting Summary Judgement in favor of Respondents Roy H. Park Broadcasting Co., Inc. and Roy Hardee thereby raising another issue of due process of law and equal protection under the laws, pursuant to the 5th and 14th Amendments of the United States Constitution. Judge Llewellyn found that two news reports were protected by absolute privilege because they were the reporting of duly constituted judicial proceedings. Record, pp 239-242. Appendix, pp 9-13. He also found that two other news reports were protected by qualified privilege in that they were the reporting of a public concern and that the Petitioner had failed to show that such reporting was made out of actual malice. The Respondents have never

pled absolute privilege as to any news reports. That constitutional issue was first raised in their arguments seeking the entry of summary judgement and, as stated above, was decided in the Respondents' favor. Because he had not been told when the Trial court would rule on the Respondents' Motion For Summary Judgement, the Petitioner was not present when summary judgement was entered in open court. He later entered a timely Notice Of Appeal and exception to the Order entering Summary Judgement. Record, p 243.

On April 11, 1988, Judge Llewellyn denied the Petitioner's Motion For Relief From Orders which sought to have the hereinabove referred to Notice Of Dismissal declared valid and which sought to have the Summary Judgement in favor of Respondents Roy H. Park Broadcasting Co., Inc. and

Roy Hardee declared invalid, partly on the grounds that the entry of summary judgement based in part on absolute privilege as to news reports of judicial proceedings is prohibited by Article 1, Section 14 of the Constitution of North Carolina and violates the Petitioner's rights pursuant to the 1st, 5th and 14th Amendments of the United States Constitution.

On April 11, 1988, the Petitioner filed and served a Notice Of Dismissal, without prejudice, of all of his claims against Defendants Capital Cities-ABC, Inc. and Ned Warwick. On June 3, 1988, the Petitioner filed and served Notice Of Dismissal, without prejudice, of all of his claims against Defendant Willis Talton. On June 6, 1988, before Respondents Roy H. Park Broadcasting Co., Inc. and Roy Hardee's Motion For Sanctions was heard, they dismissed, without prejudice, their counterclaim for

attorney's fees pursuant to N.C. Gen. Stat. 6-21.5. Following that dismissal, the only claim that had not been adjudicated in some form was Defendants Capital Cities-ABC, Inc. and Ned Warwick's claim for attorney's fees pursuant to N.C. General Statute 6-21.5. On June 6, 1988 during the hearing of Respondents Roy H. Park Broadcasting Co., Inc. and Roy Hardee's Motion For Sanctions pursuant to Rule 11 (a) of the North Carolina Rules of Civil Procedure, the Petitioner moved that a final judgement be entered. Judge Llewellyn denied that motion and made a determination that the Summary Judgement entered on January 22, 1988 was a final judgement at the time it was entered. Judge Llewellyn then allowed the Motion For Sanctions and awarded Respondent Roy H. Park Broadcasting Co., Inc. $13,450.00 for attorney's fees. The Petitioner excepted from the Order entering sanctions in open court, thereby raising an issue as to due

process of law and equal protection of the laws. Record, pp 256-260. Appendix, pp 14-18.

The Petitioner filed and served a timely Notice Of Appeal to the North Carolina Court Of Appeals from Judge Llewellyn's Order entering sanctions. He also included in the notice his appeal from the following determinations of Judge Llewellyn: (a) Denial on June 6, 1988 of the Petitioner's oral motion that a final judgement be entered, (b) determination on June 6, 1988 that the Summary Judgement entered on January 22, 1988 in favor of Respondents Roy H. Park Broadcasting Co., Inc. and Roy Hardee was a final judgement instead of being interlocutory, (c) the Order entered on January 22, 1988 granting interlocutory Summary Judgement to Respondents Roy H. Park Broadcasting Co., Inc. and Roy Hardee, (d) the Order entered on

January 21, 1988 which declared the Petitioner's Notice Of Dismissal of his claims against Respondents Roy H. Park Broadcasting Co., Inc. and Roy Hardee to be invalid, (e) denial on January 21, 1988 of Petitioner's oral motion that his Motion To Join New Defendents, Motion To Amend Complaint, Motion To Supplement Complaint be heard before the Motion For Summary Judgement of Respondents Roy H. Park Broadcasting Co., Inc. and Roy Hardee was heard. Record, pp 264-266.

On June 20, 1988, the Respondents filed their Motion To Dismiss Appeal, pursuant to Rule 25 of the North Carolina Rules of Appellate Procedure. Judge Llewellyn refused to hear the motion. On August 4, 1988, the motion was heard by Judge John B. Lewis, Jr. He found that the only appeal which had been timely filed by the Petitioner was his appeal from the June 6, 1988

order of Judge Llewellyn entering sanctions against the Petitioner. No allegation or finding of fact was made as to the Petitioner having failed to properly prosecute his appeal after his Notice Of Appeal was entered. The Petitioner gave oral notice of appeal from Judge Lewis' Order at the hearing and then timely served a written Notice Of Appeal. On September 22, 1988, a hearing to settle the Record On Appeal in the first appeal was held before Judge Llewellyn. Many items (including all of the evidence) that were part of the Petitioner's Proposed Record On Appeal were deleted at the request of the Respondents and over the objections of the Petitioner. The Petitioner's Motion That Additional Portions Of Trial Court Record And Transcript Be Sent Up And Added To Record On Appeal in the first appeal (seeking to send up all of the evidence on file in the court below) was denied by the

North Carolina Court Of Appeals on October 13, 1988, the same date that the Record On Appeal was filed in the first appeal. On November 7, 1988, the Record On Appeal was filed in the Petitioner's second appeal, (appealing from the dismissal of most of his first appeal). On November 18, 1988, the North Carolina Court Of Appeals allowed the Respondents' motion that two video tapes be sent up and added to the records on both appeals. On November 30, 1988, the same Court denied the Petitioner's Request For Reconsideration Of Order Granting Defendant-Appellees' (Respondents) Motion To Add To Record On Appeal (seeking to have none or all of the evidence on file in the Court below added to the Record On Appeal in the first appeal and none added in the second appeal). On January 23, 1989, the Petitioner's Motion that first and second appeals be heard by the same panel of the

North Carolina Court Of Appeals was allowed.

On November 7, 1989, the North Carolina Court Of Appeals entered its Opinion which determiend that the trial court committed reversable error by dismissing the Petitioner's appeal from the summary judgement entered in favor of the Respondents. The Court also determined that the materials before it were insufficient to determine whether or not the entry of sanctions against the Petitioner was in error. The order dismissing the Petitioner's appeal as to the January 1988 rulings was reversed and the case was remanded to allow the parties to prepare a new (third) record on appeal and briefs on the questions presented, including the appeal of the order of sanctions entered on June 6, 1988. In his Record On Appeal (third appeal) filed on February 14, 1990, the Petitioner excepted

to and assigned as error the trial court's Order declaring his Notice Of Dismissal invalid, Order entering summary judgement (based in part on absolute privilege as to two news reports of judicial proceedings) and Order entering sanctions, thereby keeping alive the earlier raised constitutional issues of absolute privilege and qualified privilege pursuant to Article 1, Section 14 of the Constitution of North Carolina and the 1st Amendment of the United States Constitution and the earlier raised constitutional issues of due process of law and equal protection of the laws, pursuant to the 5th and 14th Amendments of the United States Constitution. Record, pp 264-267. In his Brief and Reply Brief filed with the North Carolina Court Of Appeals, the Petitioner argues that the entry of summary judgement against him is contrary to North Carolina Constitutional law and quotes

Article 1, Section 14 of the North Carolina Constitution as supporting that contention. He also argues that the 1st and 14th Amendments of the United States Constitution prohibit absolute privilege as to news reports. In their Brief the Respondents argue that they are protected by absolute privilege as to some news reports. In his Brief, the Petitioner argues that the trial court's ruling that his Notice Of Dismissal is invalid, the trial court's entry of summary judgement and the trial court's entry of sanctions violates his rights to due process and equal protection under the laws pursuant to the 5th and 14th Amendments of the United States Constitution. Further, the Petitioner argues in his Brief that, should the North Carolina Court Of Appeals leave the Summary Judgement or sanctions in place, such will violate his rights to due process and equal protection of the laws,

pursuant to the 5th and 14th Amendments of the United States Constitution.

On February 5, 1991, the North Carolina Court Of Appeals filed its Opinion affirming the trial court's entry of Summary Judgement in favor of the Respondents, the trial court's entry of sanctions against the Petitioner (including $13,450.00 in attorney's fees) and the trial court's determination that the Petitioner's Notice Of Dismissal was invalid because the Petitioner had rested his case at the summary judgement hearing when he filed the Notice Of Dismissal. Appendix, pp. 49-54.

On March 11, 1991, the Petitioner timely filed his Notice Of Appeal (of right, asserted by Petitioner to involve substantial Constitutional questions) and his Petition For Discretionary Review addressed to the Supreme Court of North Carolina. In his Notice Of Appeal to that Court, the

Petitioner keeps alive the hereinabove referred to constitutional issues by referring to them, describing when and how they arose, describing how the 1st Amendment issues were ruled upon and by giving other details concerning what had previously been done to keep the constitutional issues viable. On April 5, 1991, the Supreme Court of North Carolina allowed the Respondents' Motion To Dismiss Appeal for lack of a substantial constitutional question and denied the Petitioner's Petition For Discretionary Review. Appendix, pp 55-56.

On April 29, 1991, the Petitioner's application for a stay of enforcement of judgement, pending timely filing (and disposition of) his planned for writ of certiorari with this Court, was denied by Chief Justice William Rehnquist. On about May 20, 1991, the Petitioner's renewal of his Application (No. 805) seeking a stay of

enforcement of judgement, addressed to Justice Byron White and referred to this Court, was denied.

(b) Statement of the Facts:

Many of the facts relating to this appeal involve the proceedings and appear under Statement of Proceedings on pages 7-22 hereinabove. Additional procedural facts include the fact that, at the hearing of the Respondents' Motion For Summary Judgement on January 21, 1988, the Petitioner served his Notice Of Dismissal of all of his claims against the Respondents at 10:50 A.M. before (and instead of) presenting oral argument or evidence. After entering the Order declaring Petitioner's Notice Of Dismissal invalid, the Court offered to let the Petitioner present evidence and argument opposing the Respondents' Motion For Summary Judgement.

The summary judgement entered in favor

of the Respondents is based in part on absolute privilege as to news reports of duly constituted judicial proceedings and in part on qualified privilege as to news reports of matters of public concern, with the Court finding that the Petitioner had failed to show that those broadcasts protected by qualified privilege were made out of actual malice.

The entry of sanctions against the Petitioner did not occur until after summary judgement in favor of the Respondents was entered and the entry of sanctions was based at least in part upon the entry of summary judgment.

The facts forming the basis of the Petitioner's action against the Respondents are essentially as alleged in paragraphs 8-13, paragraphs 14-18 and paragraphs 21-22 of the verified Amended Complaint, Appendix, pp63-66, 66-69, 71-72 plus the related

statements alleged to be false or distortions of the truth contained in Attachments A, B, C and D of the Amended Complaint. Appendix, pp 83-110. The Respondents pled that the publications complained of are true and therefore absolutely privileged. Appendix, pp 121, 128. They never argued truth as a defense at any hearing in this action or in any brief or memorandum filed in this action. Instead, they have relied upon multiple types of privilege and upon the Affidavit of Respondent Roy Hardee declaring that the information was aired as fairly and honestly as possible under the circumstances available; that neither he nor any other employee of WNCT-TV had any doubts as to the truth and accuracy of the material contained in the broadcasts at issue or had any notice sufficient to raise such doubts as to the truth of the material

contained in the broadcasts, and declaring that Respondent Hardee and all WNCT-TV employees made reasonable efforts to verify the information supplied to them by their news sources, including the Petitioner, and believed at all times that the sources supplying information concerning the controversies were reliable, trustworthy and credible.

The Petitioner has pled that Respondent Roy Hardee knew, or should have known, at the time of the telecasts concerning which the Petitioner complains that some of the material contained in the telecasts falsely defame him. Appendix, p 64 (paragraph 9), p 65 (paragraph 11), p 67 (paragraph 15). The Petitioner alleges that the Respondents have an obligation to make a reasonable effort to report events complained of accurately and with reasonable fairness to all persons and other entities involved and that

they failed to do so. Appendix, pp 71-72 (paragraph 21). The Petitioner alleges that the failure was due at least partly to efforts to maintain or increase advertising revenues. Appendix, pp 71-72 (paragraph 21). The Petitioner alleges that Respondent Hardee's failure to fulfill his accuracy and fairness obligation was due partly to his disapproval of the Petitioner's refusal to accept Medicaid payment for medical services provided to Respondent Hardee's mother-in-law by the Petitioner. Appendix, p 72 (paragraph 21).

Because of what he considered to be slanted and unusual media coverage of a malpractice action, the Petitioner called Respondent Roy Hardee on November 3, 1985 and provided him numerous facts and details relating to the controversy surrounding University Nursing Center and the Pitt County Nursing Home Community Advisory Committee.

During the conversation, the Petitioner furnished Respondent Hardee with many of the details relating to the malpractice action which had recently been brought against the Petitioner and others by Josephine House. In his affidavit defending against summary judgement, the Petitioner testifies that, over a month before the telecasts relating to the Josephine House malpractice action, he told Respondent Roy Hardee that the patient had changed physicians one day after the incident alleged to have caused her fractured femur. Record, p 131. Further, he testifies that a few days after the telecasts Respondent Hardee indicated to the Petitioner that he remembered that the Petitioner had told him that the patient had changed physicians approximately 28 hours after the incident alleged to have caused her fractured femur (which was discovered about 3 weeks later). Record, p 149. In

his Affidavit, the Petitioner contends that any reasonable person who accepted the information that he gave Respondent Hardee to be the truth should have concluded that the Petitioner was almost certainly not guilty of medical malpractice in connection with a fracture of Josephine House's right femur that occurred at an unknown time, which may have occurred inside or outside of University Nursing Center and which may have been due to an injury or may have occurred spontaneously. Record, page 132. The complained of telecasts of December 19-20, 1985 contained no reference to the Petitioner's contentions as to the facts relating to Josephine House's fractured femur. During each telecast, the Petitioner was accused of neglecting the patient over a 3 week period after the incident. The fact that the patient changed

physicians one day after the incident was not mentioned. During each telecast, a news reporter twice stated that Josephine House was seeking $1.5 million in damages. The complaint in the Josephine House malpractice action states that Josephine House was seeking an amount exceeding $10,000 and a second amount exceeding $10,000 as punitive damages.

On the evening of February 17, 1986, the Petitioner briefed Respondent Hardee and WNCT-TV news reporters in considerable detail regarding the problem of decubitus ulcers in general and in regard to Clarence Ormond's ulcers in particular.

The Petitioner, in a letter to Respondent Roy Hardee dated March 4, 1986, requested that any future broadcast material concerning patient care by him be discussed with the Petitioner before being broadcast. The request was not honored and on August 22,

1986, without contacting the Petitioner, WNCT-TV telecasted a news report containing visual material which creates the false impression that the Petitioner was a defendant in the legal action that was the subject of the news report. Appendix, pp 68-69 (Amended Complaint, paragraphs 17-18).

In connection with each of his claims, the Petitioner contends that the acts and/or omissions of the Respondents which he alleges to be wrongful occurred due to actual malice on the part of the Respondents and with wanton and willful disregard for the rights of the Petitioner. Appendix, pp 73-74, 76-77 (Amended Complaint, paragraph 26, 32), Appendix, p 136 (Plaintiff-Appellant's Counterclaim, paragraph 3).

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

(a) The Affirmation Of Summary Judgement Based In Part On Absolute Privilege Of

News Reports Of Judicial Proceedings By The North Carolina Court Of Appeals And The Dismissal Of The Petitioner's Appeal From That Affirmation By The Supreme Court Of North Carolina (For Lack Of A Substantial Constitutional Issue)Is In Conflict With Decisions Of This Court Relating To Privilege, Pursuant To The 1st Amendment Of The United States Constitution, Is In Conflict With Decisions Of The Supreme Court Of North Carolina And The North Carolina Court Of Appeals, Pursuant To Article I, Section 14 Of The Constitution Of North Carolina And Is In Conflict With Numerous Decisions In Courts Of Last Resort In Many If Not All Other States.

The Petitioner respectfully submits that this Court has never recognized any absolute privilege as to news reports of any

type. This Court did not embrace such absolute privilege in New York Times Co. v Sullivan, 376 U.S. 254, 84 S.Ct 710, 11 L.E. 2d 686 (1964), in Curtis Publishing Co. v Butts, 388 U.S. 130, 87 S.Ct. 1975 (1967), in Rosenbloom v Metromedia, Inc., 403 U.S. 29, 91 S.Ct. 1811 (1971), in Gertz v Robert Welch, Inc., 418 U.S. 323, 11 S.Ct. 2997 (1974), in Time, Inc. v Mary Alice Firestone, 424 U.S. 448, 96 S.Ct. 958 47 L.Ed. 2d 154 (1976) or in Dunn and Bradstreet, Inc. v Greenmoss Builders, Inc., 105 S.Ct. 2939 (1985).

The Respondents have repeatedly argued that they are protected by absolute privilege as to news reports of judicial proceedings and repeatedly cited Scott v Statesville Plywood and Veneer Co., 240 N.C. 73, 81 S.E. 2d 146 (1954) as supporting that argument. Scott actually deals with allegations that defamatory statements were published by a

plaintiff filing them in a complaint and affidavit as part of court proceedings and by causing a related Notice of Summons and Notice of Attachment to be published, allegedly accusing the defendant (Scott) of fraud and conspiracy. Scott does not deal with news reports of judicial proceedings. The Notices published were part of the court proceedings and for that reason were ruled to be absolutely privileged, as were the court documents filed in that action. Even so, the Opinion of the North Carolina Court Of Appeals in this action cites Scott, supra., as supporting its determination that two news reports of judicial proceedings are protected by absolute privilege. Appendix, p 39. The Court Of Appeals Opinion also cites Burton v NCNB, 355 S.E. 2d 800 (1987) as supporting absolute privilege as to news reports of judicial proceedings. It is not clear why that Court cites its own Opinion

in Burton as supporting absolute privilege as to news reports of judicial proceedings in the instant case. No media publication was involved in Burton. The Court Of Appeals' Opinion in that case deals with a letter written by a bank's attorney to an alleged guarantor's attorney relating to a lawsuit the bank had brought against the alleged guarantor. The Court Of Appeals ruled that statements made in the letter were absolutely privileged because they had been published in the due course of a judicial proceeding and were not "so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety." (Citation omitted.)

The Opinion of the North Carolina Court Of Appeals in the case sub judice contains a number of other findings (in addition to the ruling of absolute privilege as to some news reports) which are surprising. In

connection with affirming the trial court's determination that the Petitioner's Notice Of Dismissal is invalid because he had rested his case when he filed the Notice, the Opinion states that the Petitioner cites no authority and makes no argument in his Brief regarding the Constitutional issues. For that reason the Court Of Appeals deemed that portion of the Petitioner's argument abandoned. On page 15 of his Brief filed with the Court Of Appeals, the Petitioner cites pages 45-50 of the verbatum transcript of proceedings at the January 21, 1988 hearing on Record On Appeal (and appended to the Brief) as showing clearly that the Petitioner had not rested his case when he served his Notice Of Dismissal. Further, findings of fact # 14-17 of the Order declaring the Notice Of Dismissal invalid, Appendix, pp 4-5, are also cited in the Brief as showing that the Petitioner had not rested his case. The Petitioner next

argues in his Brief that he had an absolute right to take a voluntary dismissal of his claims, at any time before he rested his case, pursuant to North Carolina General Statute 1A-1, Rule 41 (a)(1). (See page 6 above.) Next he quotes from that rule. Plaintiff-Appellant's Brief, page 15-16. Then he argues that, by denying him his absolute right pursuant to North Carolina Statutory law, the trial court violated his Constitutional rights to due process and equal protection under the 5th and 14th Amendments of the United States Constitution. And he goes on to cite Maurice v Hatterasman Motel Corporation, Inc., 38 N.C. App 588 248 S.E. 2d 430 (1978), as not supporting a contention that the Petitioner had rested his case when he filed and served his Notice Of Dismissal. Plaintiff-Appellant's Brief, p 17. (In Maurice, a motion for summary judgement had been allowed and the judgement

had been signed but not filed when the plaintiffs filed their notice of voluntary dismissal with the clerk of court.) In his Reply Brief, pp 2-3, Petitioner argues that a party has not rested his case until he has exhausted all of the opportunities that are usually afforded to present evidence and/or argument at either a trial or a summary judgement hearing which proceeds to either submission to a trier of facts (jury or judge) in a trial or to submission of the matter to the court for determination as to summary judgement motions and cites Wesley v Bland, 92 N.C. App. 513, 374 S.E. 2d 475 at 477 (1988) as supporting that contention.

If arguing that a court ruling violates one's rights because a specific statutory law prohibits such a ruling and then arguing that entering the ruling contrary to the specific statutory law violates one's right to due process and equal protection of the laws,

pursuant to the 5th and 14th Amendments of the United States Constitution is not sufficient to keep Constitutional issues of due process and equal protection of the laws alive, just what does it take? Further, in Wesley, supra, the Petitioner served and entered his voluntary dismissal after the defendant rested his case. In the instant case, the Respondents rested their case, then the Petitioner inquired concerning what portions of his Affidavit the Court was going to strike pursuant to the Respondents' Motion To Strike. When the Court refused to specify what portions of the Affidavit he was going to strike, the Petitioner requested that he be allowed to testify under oath. (At that point in time, the Petitioner's deposition had never been taken in this action.) When that request was refused by the Court, the Petitioner then filed his Notice Of Dismissal (instead of utilizing the opportunity he had

ahead to present his forecast of evidence and argument). The Petitioner respectfully submits that there is no significant difference between Wesley and the instant case as to when the notices of dismissal were filed. Yet, the Court Of Appeals ruled that the dismissal in Wesley is valid and that the dismissal in the instant case is invalid.

Further, the Court Of Appeals' Opinion states that, in connection with his appeal from the entry of Summary Judgement, the Petitioner cites no authority and makes no argument as to his Federal Constitution allegations and that the Court deems that portion of the Petitioner's assignment of error abandoned. Appendix, p 33. On pages 17-18, 20-24 of the Plaintiff-Appellant's Brief, the Petitioner argues that the entry of sumamry judgement is not supported by statutory law (N.C.G.S. 1A-1, Rule 41 (a) (1) and Rule 56 (c) in particular), that the

ruling of absolute privilege as to some news reports is in conflict with Article 1, Section 14 of the Constitution of North Carolina and that the ruling violates the Petitioner's right to privacy pursuant to the 1st and 14th Amendments of the United States Constitution, and his right to due process and equal protection under the laws, pursuant to the 5th and 14th Amendments of the United States Constitution. Further, he quotes Article 1, Section 14 of the Constitution of North Carolina. On pages 6-7 of his Reply Brief, the Petitioner argues again that Article 1, Section 14 of the Constitution of North Carolina prohibits absolute privilege as to any news reports and cites Yancey v Gillespie, 342 N.C. 227, 87 S.E. 2d 210 (1955) as supporting that argument. What else does it take to keep the Federal Constitutional issues alive, pursuant to the 1st, 5th and 14th Amendments?

In their Opinion, the North Carolina

Court Of Appeals appears to ignore the Petitioner's arguments that Article 1, Section 14 of the Constitution of North Carolina prohibits absolute privilege as to any news reports. Plaintiff-Appellant's Brief, p 23, Plaintiff-Appellant's Reply Brief, pp 6-7. Article 1, Section 14 states as follows:

> Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.

The Supreme Court Of North Carolina has held that the privilege granted by then Article 1, Section 20 of the Constitution of North Carolina was a qualified one. Yancey v Gillespie, supra. Then Article 1, Section 20 states:

> FREEDOM OF THE PRESS. The freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained, but

> every individual shall be held responsible for the abuse of the same.

Clearly, then Article 1, Section 20 and present Article 1, Section 14 are similarly worded and both appear to grant a qualified immunity as to news reports.

The Petitioner has reviewed appellate opinions in more than 25 North Carolina cases alleging false defamation. Many of the opinions refer to the qualified privilege which partially protects the media as to false defamatory news reports. None of the opinions reviewed as much as suggest that news reports of judicial proceedings are absolutely privileged under North Carolina law. Further, the Petitioner has searched the American Law Review, Strang's North Carolina Index, the North Carolina Law Review and reviewed the opinions in about 15 false defamation cases filed in State courts other than North

Carolina or in Federal Courts. He has no reference or opinion, other than the one in the instant case, which supports absolute privilege as to any news reports in any jurisdiction in this country. Therefore, he respectfully submits that such absolute privilege does not exist in this country. Further, the Petitioner respectfully submits that, while the 1st Amendment of the Constitution of the United States protects freedom of the media, it also protects the rights of persons to be left alone (right to privacy, right to freedom from being maliciously falsely defamed); thereby making absolute privilege as to any news reports unconstitutional.

The Petitioner respectfully submits that, if absolute privilege as to news reports of judicial proceedings does not exist in North Carolina, his right to due process and equal protection of the laws,

pursuant to the 5th and 14th Amendments of the Constitution of the United States was clearly violated by the entry of summary judgement based in part on such absolute privilege. Further, if such absolute privilege does not exist, the entry of sanctions (including $13,450 in attorney's fees) for having filed the Amended Complaint that was terminated by Summary Judgement based partly on absolute privilege, the Petitioner's right to due process of law and equal protection of the laws were again violated. Going further, the Petitioner respectfully submits that, if absolute privilege as to any news reports clearly does not exist in North Carolina, the entry of summary judgement based in part on such news reports, the affirmation of the judgement by the North Carolina Court Of Appeals and the dismissal of the Petitioner's appeal by the Supreme Court Of North Carolina raise a genuine issue as to whether the determination

that the Petitioner's Notice Of Dismissal is invalid, that determination's affirmation by the North Carolina Court Of Appeals and the Supreme Court Of North Carolina's refusal to review the determination all occurred due to prejudice; thereby violating the Petitioner's 5th and 14th Amendment right to due process of law and equal protection of the laws.

The Petitioner further submits that the Respondents destroyed their qualified privilege, if any existed, through abuse. However, he does not consider it feasible to present the forecast of evidence needed to support that contention within the confines of this petition.

(b) The Entry Of A Sanction Of Attorney's Fees, Pursuant To North Carolina General Statute 1A-1, Rule 11 (a) Needs To Be Closely Monitored And Settled By This Court Because Such

Sanctions Are Relatively New, Deeply Involve One's Right Pursuant To The 5th, 14th And 7th Amendments Of The United States Constitution And Can Easily Be Employed By Incompetent Or Severely Prejudiced Judges To Inflict Unfair And Severe Injury Upon Unfavored Litigants.

Clearly, some deterent needs to be in place to prevent frivolous litigation. One needs to look no further than In re Kunstler, 914 F. 2d 505 (4th Cir. 1990), to find a case in which the entry of a major monetary sanction (pursuant to Rule 11) is probably justified. On the other hand, one needs to look no further than this case to find one in which the entry of a major sanction ($13,450) in attorney's fees is clearly not justified. As argued hereinabove under (a), the Petitioner was sent packing by the entry of a summary judgement against him based in

part on non-existent absolute privilege as to news reports of judicial proceedings. Then he was rocked and socked by the entry of sanctions for having filed the Amended Complaint eliminated by the Summary Judgement based in part on non-existent absolute privilege. The Summary Judgement was not entered until about 13 months after the Petitioner filed this action. If the Plaintiff's Complaint was indeed spurious, without foundation and a sham upon the court, why was it not dismissed long before the summary judgement hearing?

The Respondents pled truth, but they have never argued truth or established that any of the Petitioner's factual allegations are false. The Petitioner urges this Court to read his Amended Complaint. Appendix, pp 61-110. Absent a showing that its factual allegations are mainly false, the Petitioner respectfully submits that

considering the Petitioner's legal layman status, this Court will agree that the Complaint is not spurious, without foundation or a sham upon the court and that such a finding, its affirmation by the North Carolina Court Of Appeals and the refusal of the Supreme Court Of North Carolina to hear the matter strongly suggest that the Petitioner may have encountered at least a little bias along the way.

(c) The Petitioner Respectfully Submits That This Court May Need To Reaccess The Role Of Media Outlets In Informing The Public And Further Submits That Media Response To The Entry Of Summary Judgement And The Entry Of Sanctions In This Action Provides Insight As To The Motives Of Many Media Outlets.

Before the Summary Judgement based in part on non-existent absolute privilege as

to news reports of judicial proceedings, several media outlets were anxious to report on several frivolous malpractice suits entered against the Petitioner in connection with a controversy which engulfed a nursing home where the Petitioner served as medical director and as an attending physician. After Summary Judgement based in part on non-existent absolute privilege as to news reports of judicial proceedings and sanctions based in part on the entry of Summary Judgement were entered, the previously anxious media outlets seemed to lose their interest in reporting on the Petitioner's stormy journey through the North Carolina Court System. During the last year, the Petitioner, feeling that publication of his experiences at the courthouse might be helpful as to clearing his name and protecting his rights, has approached more than twenty media sources seeking coverage as to court proceedings in

which he has been involved. None of them have shown any willingness to report on the odd adverse rulings (such as the entry of summary judgement based in part on non-existent absolute privilege) which the Petitioner has encountered. For example, Sixty Minutes was not interested. James J. Kilpatrick begged off. CNN did not reply to the Petitioner's letter. The Washington Post and The New York Times did not reply. The Washington Star indicated that it thought the Petitioner wanted it to publish information concerning Social Security inequities. About 12 North Carolina newspapers and 3 TV stations did not answer letters the Petitioner addressed to them. The Raleigh (N.C.) News And Observer (which on its own accord published a report relating to the malpractice action entered by Josephine House against the Petitioner and others that led to TV news reports which

part of this action is based upon), has been kept well informed by the Petitioner as to the unusual court rulings that have occurred. Not only has that newspaper refused to report the oddity of the court rulings, but it has refused to allow the Petitioner to comment on any of them in the People's Forum section of the newspaper. Further, the News And Observer recently refused to publish the Petitioner's letter to the editor in response to an article relating to Rule 11 sanctions entered against William Kunstler and Barry Nakell and which refers to the entry of summary judgement against the Petitioner based in part on non-existent absolute privilege and the entry of sanctions for having filed the Complaint upon which the Summary Judgement was entered. The newspaper claimed that it refused to publish the letter because it deals mainly with the

Petitioner's problems.

In view of the above, the Petitioner respectfully submits that media outlets which rush to the front seeking material to help fill their coffers with advertising and other revenues often turn stone silent when it appears that reporting the truth may hurt them or their media brothers.

The Petitioner respectfully submits that this Court may have inadvertently extended more protection to the media than is justified. If numerous media elements are going to ignore their responsibility to fairly publish news items and are going to selectively refuse to report on events because such reporting might enlighten the public concerning court rulings which mainly serve to protect them and/or other members of the media fraternity, it follows that such news outlets are clearly not performing

the public service envisioned by the framers of our Constitution and by this Court. Are many of our media outlets who take pride in being considered "reputable" really more interested in feathering their own nest than they are in fairly informing the public? If they are, do they really deserve the almost absolute privilege they now enjoy? Those questions are of much concern to the Petitioner. For about 35 years, he practiced family medicine, mostly in small towns. In the past he did home deliveries. He has made thousands of house calls. He has sincerely tried to provide good care for his patients. He never got rich along the way. He was awarded a Bronze Star and a Letter of Commendation with a Combat V while serving as a medical officer during the Korean War. And he did all of those things while seldom being allowed to shield himself legally through privilege. He respectfully

submits that, under such circumstances, he is entitled to some bitterness as to having been victimized by unfair media tactics.

CONCLUSION

For the foregoing reasons the Petitioner respectfully requests that the Court issue a writ of certiorari to review the dismissal of the Petitioner's Appeal by the North Carolina Supreme Court and the Opinion of the North Carolina Court Of Appeals affirming the trial court's entry of Summary Judgement, entry of sanctions against the Petitioner and determination that the Petitioner's Notice Of Dismissal is invalid. Further, the Petitioner respectfully requests that the Court reassess the status of Rule 11 sanctions to determine whether they are being improperly applied to discourage persons with limited resources as to seeking their day in court when their rights have been violated by someone higher in society's pecking order (usually someone wealthy). Still further,

the Petitioner respectfully submits that the media, through almost absolute privilege and by employment of legal technicalities, using high powered (and highly paid) attorneys, are being overly protected. He requests that the Court give some consideration as to reducing media protection and thereby leveling the playing field, at least a little.

Respectfully submitted, this the 2nd day of July, 1991.

Joseph M. Ward

Joseph M. Ward
209 Manatee Drive
Swansboro, NC 28584
Telephone: 919-326-7173
Petitioner

91-182 (2)

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER 1991 TERM

****

JOSEPH M. WARD

PETITIONER

V

ROY H. PARK BROADCASTING CO., INC. AND ROY HARDEE

RESPONDENTS

****

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

****

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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INDEX

NORTH CAROLINA — IN THE SUPERIOR COURT
OF JUSTICE
SUPERIOR COURT DIVISION
PITT COUNTY — FILE NO. 86 CVS 2243

JOSEPH M. WARD

VS. — ORDER

ROY H. PARK BROADCASTING CO., INC. ROY HARDEE, ROY H. PARK, CAPITAL CITIES/ABC, INC., NED WARWICK, AND WILLIS A. TALTON,
Defendants.

THIS MATTER did come on to be heard before the Undersigned Judge assigned to hold the civil session of Superior Court of PItt County for the week of January 18, 1988. Upon motion for summary judgment in favor of these two defendants, Roy H. Park Broadcasting Company and Roy Hardee, and from the file the Court makes the following

FINDINGS OF FACT:

1. This motion was filed and notice thereof given some time in October of 1987.

2. That it was continued to the week of January 18, 1988 by The Honorable

Bradford Tillery, Superior Court Judge presiding during a civil session of the Pitt County courts.

3. A motion to continue the hearing from the week of January 18 1988, said motion having been filed by the plaintiff, was denied by The Honorable Robert Burroughs Superior Court Judge presiding during the January 11, 1988 mixed term of Superior Court of Pitt County.

4. At the call of the calendar of the week of January 18, 1988, which took place on the 19th day of January, 1988 due to the honoring of the national holiday set aside in memory of the late Martin Luther King.

5. On the 19th day of January, 1988, at the call of the calendar the plaintiff's wife stood and announced that her husband had to make an appearance before the Clerk of Superior court of Martin County and the Court allowed the plaintiff's wife to act as spokesman for the plaintiff,

who is appearing pro se.

6. The court informed the plaintiff's wife that the matter would be heard during this week of January 18, 1988 as soon as the Court could have the matter heard.

7. The Court further informed the plaintiff's wife that the motions would be heard in the order that they had been filed with the Court in answer to her request that the plaintiff's motions, which are pending, be heard before the motion for summary judgment is heard.

8. On the 21st day of January, 1988 at 9:30 a.m. this matter was called by the Undersigned Judge for hearing on the motions then pending before this Court.

9. Present at the hearing was the plaintiff, representing himself, and James Cheatham representing the defendants Roy H. Park Broadcasting company and Roy Hardee.

10. This Court informed both parties

that the Court had read all of the pleadings up to the date of the filing of the motion for summary judgment.

11. The Court also had read the affidavit in support of the defendant's motion for summary judgment of one Roy Hardee.

12. The Court was supplied with the affidavit of the plaintiff, Joseph M. Ward, which was filed in the office of the Clerk of Superior Court of Pitt County on the 19th day of January, 1988, which affidavit the Court finds was duly filed and could be considered as to those matters that were relevant and constituted admissible evidence in the case or would give a forecast to admissible evidence.

13. The hearing was begun and at approximately five minutes to eleven the defendants, Park Broadcasting and Hardee, rested their argument.

14. The Court then turned to the plaintiff to inquire of the plaintiff whe-

ther or not he wished to proceed and present his argument on the defendant's motion for summary judgment.

15. After some conversation with the plaintiff, which is contained in the record, the plaintiff demanded of the Court that the Court make its ruling on the plaintiff's affidavit to inform him whether or not he should take a voluntary dismissal of this action.

16. The court refused to inform the plaintiff of what action would be taken in regard to his affidavit in light of the fact that the defendants had rested their argument and had addressed the plaintiff's affidavit.

17. The plaintiff, instead of offering argument or evidence other than the affidavit, informed the Court that if the Court would not make a ruling on his affidavit that he would take a voluntary dismissal without prejudice in the case.

18. Chapter 1A-1 of the North

Carolina General Statutes Rule 41A(1) does allow the plaintiff to take a voluntary dismissal of his case at any time prior to resting his case.

19. In light of the fact that the defendants had completed the presentation of their argument on the motion for summary judgment and the plaintiff was given an opportunity to present other argument or affidavits or give a forecast of his evidence, the Court is of the opinion, based on North Carolina Court of Appeals holding in Maurice v. Hatterasman Motel Corporation 38 N.C. App. 588, that the plaintiff had rested his case as to this summary judgment motion hearing.

20. The plaintiff has at this time, which is now 11:21, filed with the Clerk of the Superior Court of Pitt County a voluntary dismissal without prejudice, which notice of dismissal is typewritten and dated January 21, 1988 and could only be presented by the plaintiff had it been prepared before

the opening of this Court at 9:30 this morning, as the plaintiff has been present in the courtroom since the arguments on the motion began.

21. It is apparent to the Court that it was the plaintiff's design that if the motion for summary judgment did not go to his liking that he would take a voluntary dismissal in the case without prejudice, such being a sham on the Court.

Based upon the foregoing findings of the fact this Court concludes as a

MATTER OF LAW:

1. The voluntary dismissal without prejudice which has been filed with the Clerk was not duly filed.

2. This plaintiff has been given an opportunity to present his argument and other presentations on the motion for summary judgment and has chosen not to do so.

Based upon the foregoing conclusions of law, this Court ORDERS, ADJUDGES, AND DECREES that the voluntary dismissal

without prejudice does not in and of itself take effect as of this date. This Court will now take under consideration all discovery matters, affidavits, pleadings to make a ruling on the summary judgment to which this Court rules is properly before the Court.

This the 21st day of January, 1988.

S/JAMES D. LLEWELLYN
JAMES D. LLEWELLYN,
JUDGE PRESIDING

To the entry of this order the Plaintiff respectfully excepts.

NORTH CAROLINA

PITT COUNTY

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

FILE NO. 86 CVS 2243

JOSEPH WARD

VS.

ROY H. PARK BROADCASTING ET AL, Defendants.

ORDER

THIS CAUSE COMING ON TO BE HEARD before the Undersigned Judge presiding at the January 18, 1988 Civil Session of the Superior Court of Pitt County, upon the motion by the defendants, Park Broadcastin Company, Inc. and Roy Hardee, duly filed in the office of the Clerk of Superior Court of Pitt County during the month of October, 1987; that the court in determining the motion for summary judgment has considered the following items: All pleadings filed by the plaintiff and the defendant prior to the filing of this motion; the deposition of Roy Hardee dated March 27, 2987; the deposition of Lonnie Butler dated November 20,

1987; the affidavit of Roy Hardee filed in conjunction with the motion hearing being considered; the affidavit of Joseph M. Ward, plaintiff, the video tapes (marked court's exhibits 1 and 2) of the afore- broadcasts that were supplied to the Court by the plaintiff and the defendants.

Based upon the matters before the Court, it is hereby ORDERED, ADJUDGED AND DECREED that the motion for summary judgment filed by the defendants, Roy H. Park Broadcasting Company, Inc. and Roy Hardee, and the same is hereby granted as the Court finds as a matter of law:

(1) that the broadcasts of December 19, 1985 are protected by absolut privilege in that they are the reporting of a duly constituted judicial proceeding;

(2) that the broadcasts of August 22, 1987 are protected by absolute privilege and are the reporting of a duly constituted judicial proceeding;

(3) that the broadcasts of February 17 and

and February 24 are protected by qualified privilege under the laws of this State in that said broadcasts were reporting of a public concern; further the court finds as a matter of law that the plaintiff has failed to show that such reporting of broadcasts were made out of actual malice.

Thus The Court rules as a matter of law there is no genuine issue of a material fact that would take these broadcasts out of the fields of absolute and qualified privilege.

This the 22nd day of January, 1988.

S/JAMES D. LLEWELLYN
JAMES D. LLEWELLYN
PRESIDING JUDGE

FILE NO. 86 CVS 2243

FILM NO.

NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE

PITT COUNTY — SUPERIOR COURT DIVISION

JOSEPH M. WARD

VS. — ORDER OF AMENDMENT

ROY H. PARK BROADCASTING CO., INC., ROY HARDEE, ROY H. PARK, CAPITAL CITIES-ABC, INC., NED WARWICK, WILLIS A. TALTON

THIS CAUSE coming on to be heard before the undersigned assigned to and holding courts in the Third Judicial District and it appearing to the Court that its Order dated 22 January, 1988, inadvertently in Subparagraph (2) stated the date August 22, 1987, in lieu of the correct date August 22, 1986, and in Subparagraph (3) said Order failed to show the year in which the February 17th and 24th broadcasts were made and that these two corrections should be made in its Order, pursuant to Rule 60(a).

IT IS THEREFORE ORDERED that said

Order dated 22 January 1988 in the above-entitled action is amended to read as follows:

Subparagraph (2).

That the broadcasts of August 22, 1986, are protected by absolute privilege and are the reporting of a duly constituted judicial proceeding.

Subparagraph (3).

That the broadcasts of February 17 and February 24, 1986, are protected by qualified privilege under the laws of this State in that said broadcasts were reporting of a public concern; further the Court finds as a matter of law that the plaintiff has failed to show of actual malice.

Thus the Court rules as a matter of law there is no genuine issue of a material fact that would take these broadcasts out of the fields of absolute and qualified privilege.

This 27th day of January, 1988.

S/JAMES D. LLEWELLYN
JAMES D. LLEWELLYN
Presiding Judge Assigned to Third Judicial District

NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
PITT COUNTY	FILE NO. 86 CVS 2243

JOSEPH M. WARD,
PLAINTIFF,

VS.

ROY H. PARK BROADCASTING COMPANY, INCORPORATED, AND ROY HARDEE,
DEFENDANTS.

THIS CAUSE COMING ON TO BE HEARD before the Undersigned Judge Presiding at the June 6, 1988 Civil Session of the Superior Court of Pitt County upon motion for sanction under Rule 11(a) of the North Carolina Rules of Civil Procedure duly filed by the defendants Roy H. Park Broadcasting Company, Incorporated, and Roy Hardee; that the defendants represented by Mr. James Cheatham, attorney at law of the Pitt County Bar; that the plaintiff appeared pro se; and the Court after having reviewed the motion for sanctions, written objection filed by the plain-

tiff, and having received evidence in the matter and considered the arguments of counsel, makes the following:

FINDINGS OF FACTS:

1. That this matter was begun by the filing of a complaint prior to January 1, 1987;

2. That since that date an amended complaint was filed by the plaintiff after January 1, 1987, and was served upon Roy H. Park Broadcasting Company, Incorporated, and Roy Hardee, defendants.

3. That the motion for sanctions is properly before this Court, having been duly filed and notice given in February, 1988;

4. That the plaintiff has appeared pro se at all times during the course of this litigation;

5. That the plaintiff's claims were terminated by this Court by the entry of a summary judgment against the plaintiff during the month of February, 1988;

6. That at that time there was outstanding a counterclaim filed by the defendants herein;

7. That the file in this matter is voluminous exhibiting that consciencious efforts were made on behalf of the defendant by the defendant's counsel;

8. That this litigation was very technical and included multiple depositions, multiple sets of interrogatories, numerous hearings on various motions, all of which required counsel for the defendants to expend numerous hours in court appearances, deposition appearances, research, and preparation for court appearances;

9. That since February 22, 1987, the defendants have incurred legal expenses in the amount of $13,450.00;

10. That the evidence in this case points to the fact that the amended complaint in this matter was under the law spurious and without foundation;

11. That the complaint was in fact a sham on the court and was not filed in good faith.

Based upon the foregoing findings of fact, the Court makes the following:

CONCLUSIONS OF LAW:

That the complaint was not filed after a reasonable inquiry was made to learn whether or not such "claims" were well-grounded in fact and warranted by existing law and was not signed in good faith;

Further, that the legal expenses incurred by the defendants were reasonable;

Further, that the defendant should be compensated for those attorney fees incurred since February 27, 1987.

Wherefore, it is hereby ORDERED, ADJUDGED AND DECREED that the plaintiff be santioned by this Court, and he IS HEREBY ORDERED to pay unto Roy H. Park Broadcasting Company, Incorporated, the sum of $13,450.00, and judgment shall be duly entered

for that sum.

The plaintiff duly excepts in open court to the entry of the findings of fact, conclusions of law and the entry of the order.

This the 10th day of June, 1988.

S/JAMES D. LLEWELLYN
JUDGE PRESIDING

NO. 903SC179

NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 1991

JOSEPH M. WARD

v. Pitt County
No. 86 CVS 2243

ROY H. PARK BROADCASTING CO., INC., ROY HARDEE, ROY H. PARK, CAPITAL CITIES/ABC, INC., NED WARWICK and WILLIS A. TALTON

Appeal by plaintiff from orders entered 22 January and 10 June 1988 by Judge James D. Llewellyn in Pitt County Superior Court. Heard in the court of Appeals 10 December 1990.

On 17 December 1986, plaintiff filed a claim alleging false defamation (libel per se) and interference with his personal property right to practice medicine. These claims arose out of certain news stories broadcast by stations WNCT-TV and WTVD which allegedly contained "false and/or distorted and/or misleading" statements defaming plaintiff and/or University Nursing Center, where

plaintiff was Medical Director. He later filed an amended complaint on 10 February 1987. On 24 February 1987, the complaint was dismissed as to defendant Roy H. Park.

On 16 October 1987, defendants Roy H. Park Broadcasting Co., Inc. and Roy Hardee (hereinafter defendants) filed a motion for summary judgment under Rule 56 of the N.C. Rules of Civil Procedure. Plaintiff then filed a motion to join new defendants, motion to amend complaint and motion to supplement complaint on 23 December 1987.

These motions were heard before Judge Llewellyn beginning at 9:30 a.m. on 21 January 1988. On 21 January 1988, plaintiff filed a motion for voluntary dismissal as to defendants Park Broadcasting and Hardee. On 22 January 1988, the trial court entered orders that all motions would be heard in the order in which they were filed with the court (thus hearing the summary judgment motion before plaintiff's motions), that plaintiff's voluntary dismissal without

prejudice was not duly filed, and that summary judgment would be granted in defendants' favor.

Defendants filed a motion for sanctions under Rule 11(a) of the N.C. Rules of Civil Procedure against plaintiff on 8 February 1988. On 11 April 1988, plaintiff took a voluntary dismissal without prejudice of his claims against defendants Capital-Cities/ABC, Inc. and Ned Warwick. On 3 June 1988, plaintiff's claims against the remaining defendant, Willis A. Talton, were dismissed without prejudice.

The trial court heard defendants' motion for sanctions during the 6 June 1988 Civil Session of Pitt County Superior Court. The trial court entered its order in open court (and subsequently filed 10 June 1988) finding that plaintiff's amended complaint was "under the law spurious and without foundation" and "in fact a sham on the court and was not filed in good faith," and concluding as a matter of law that the complaint

"was not filed after a reasonable inquiry was made to learn whether or not such 'claims' were well-grounded in fact and warranted by existing law and was not signed in good faith." The trial court then awarded defendants attorney's fees of $13,450.00.

Plaintiff appeals from the orders of 22 January 1988 and 10 June 1988.

Joseph M. Ward, pro-se, plaintiff-appellant.

Poyner & Spruill, by James T. Cheatham and Ernie K Murray, for defendant-appellees Roy H. Park Broadcasting Co. and Roy Hardee.

ORR, Judge.

Plaintiff argues four assignments of error on appeal concerning alleged errors in the orders of 22 January and 10 June 1988. For the following reasons, we find no error and affirm the trial court's orders.

I.

Plaintiff first argues that the trail court erred in denying his motion to hear

his motions to amend the complaint and motion to supplement the complaint prior to hearing defendants' motion for summary judgment. We disagree.

At the hearing on the above motions, the trial court denied plaintiff's motion to hear his motions before the summary judgment motion. The trial court determined that it would "hear the motins in the order in which they were brought before the Court." Defendants' motion for summary judgment was filed 16 October 1987, and plaintiff's motins were filed 23 December 1987.

The trial court has broad discretion in determining whether or not to allow such motions, as well as wide latitude in the manner of allowing them. See Rule 6, N.C. Superior and District Court Rules ("Motions may be heard and determined . . . as directed by thepresiding judge."); 60 C.J.S. Motions & Orders S 38(b) (1969) (Motions should be determined as of the time submitted, although the trial court has the power to

arrange its order of business and rule on motions in the order it determines).

In the present case, the trial court determined to hear the motions in chronological order by date. Under the above principles, this is well within the trial court's discretion, and we find no error.

Plaintiff next argues that the trial court erred in declaring palintiff's notice of voluntary dismissal invalid under Rule 41(a) of the N.C. Rules of Civil Procedure because it violates his right to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution.

Plaintiff cites no authority and makes no argument in his brief regarding the Constitutional issues. Therefore, we deem this portion of his argument abandoned pursuant to Rule 28(b)(5) of the N.C. Rules of Appellate Procedure, which states in pertinent part, "Assignments of error . . . in support of which no reason or argument is stated

or authority cited, will be taken as abandoned." Therefore, we shall address whether the trial court erred in declaring plaintiff's notice of voluntary dismissal invalid.

Under Rule 41(a) of the N.C. Rules of Civil Procedure, "Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, ..." The issue before us is whether plaintiff filed notice of dismissal before he rested his case at the motions hearing on 21 January 1988.

At that hearing, the trial court heard defendants' arguments in favor of the summary judgment motion beginning at 9:30 a.m. and ending at 10:55 a.m. At that time, the trial court asked plaintiff if he wished to proceed on the summary judgment motion. Plaintiff asked the court if it would make a decision on what

it would strike from the plaintiff's affidavit, and the court responded that it would make that decision "based on a matter of law...." The trial court and plaintiff then engaged in the following exchange.

> THE COURT: . . . . .
> The problem that is before you now in your argument to the Court is the area of privileges that are afforded to the news media because of the First Amendment and Fourteenth Amendment of the U.S. Constitution.
>
> DR. WARD: We are aware of the privilege part, but before we start on that, we have heard a lot of what Mr. Cheatham (defendants' attorney) had to say in regard to background information and I take it you don't want to hear any of my background information?
>
> THE COURT: I will hear whatever you have to say that is relevant to what I just pointed out.
>
> DR. WARD: You won't rule what is relevant, about what he had to say on those issues?
>
> THE COURT: No, sir.
>
> DR. WARD: It wasn't relevant, as you well know. You want me to limit myself to those issues?
>
> THE COURT: That's the issues here.
>
> DR. WARD: He addressed a lot

of different things, Your Honor. He went back into the September business about the telecast that went on in September and went on into the news articles, this type of thing and what happened later was based upon what went on on that September broadcast and those news articles in regard to things that were not true in those.

Also, if he is going to bring that kind of thing in in regard to his privilege--

THE COURT: He only brought those in as far as this Court is concerned to show one thing, that there was a public concern about the nursing center.

DR. WARD: All right. Well --

THE COURT: Whether or not they were true or not, the public had been informed by somebody, the newspaper, that there was something to be concerned about and he brought those before this Court, I assume, that there was the existence of the public concern.

. . . .

DR. WARD: Well, I am at a disadvantage in regard to the fact that I have got before me an affidavit that I don't know what parts you are going to strike and what parts you are going

to allow and that I do not have any sworn testimony because they have never called me for a deposition, and at this point move that you allow me to be put on the stand and testify under oath, Your Honor.

THE COURT: I am going to deny that Request. Make sure you take this record, please.

DR. WARD: All right. Well, under that set of circumstances, we have gone far enough. I am going to take a voluntary dismissal of these two defendants because I am not going to let you sit there and make that decision in regard to this without my sworn testimony on the record, no, sir.

THE COURT: Well, you are saying that there are matters in the affidavit. You make this affidavit under oath, did you not, sir?

DR. WARD: I did the affidavit under oath but I don't know what parts you are going to strike, Your Honor, and you are not going to be -- Unless you tell me you are not going to be able to strike my testimony on that stand and I am not going to let anybody sit here and take my affidavit and strike it later on. If it is going to be struck, I want it struck before my argu-

> ments are heard so I know if I should take the voluntary dismissal. If you are not going to let me testify under oath, that's what I intend to do.

The trial court refused to reverse its ruling, and plaintiff attempted to take a voluntary dismissal. The trial court ruled that plaintiff had already rested his case, and therefore, the voluntary dismissal was invalid. In making its ruling, the trial court relied on Maurice v. Motel Corp., 38 N.C. App. 588, 248 S.E. 2d 430 (1978).

In Maurice, this Court stated:

> The decision of the court resulting from a motion for summary judgment is one on the merits of the case. All parties have an opportunity to present evidence on the question before the court. Where a party appears at a summary judgment hearing and produces evidence or is given an opportunity to produce evidence and fails to do so, and the question is submitted to the court for decision, he has 'rested his case' within the meaning of Rule 41(a)(i) of the North Carolina Rules of Civil Procedure. He cannot thereafter take a voluntary dismissal under Rule 41(a)(i). To rule other-

> wise would make a mockery of summary judgment proceedings.

Id. at 591-92, 248 S.E.2d at 432-33.

Both plaintiff and defendant cite other cases in support of their arguments on this issue. We have reviewed these cases and find that Maurice is on point.

In the present case, plaintiff had an opportunity to produce additional evidence and chose not to do so because the trial court would not permit him to testify under oath. As the court pointed out, plaintiff had already submitted into evidence an affidavit made under oath, and the trial court would decide as a matter of law what portions of the affidavit would be admissible. This would also be true of any testimony plaintiff could offer.

At the point plaintiff refused to go forward on the summary judgment motion because the trial court had made an unfavorable ruling, under Maurice, plaintiff "rested his case" for purposes of a voluntary dismissal under Rule 41(a)(1)(i).

Moreover, it is clear to this Court from a reading of the entire transcript of the motions hearing that plaintiff was not happy with the direction in which the summary judgment hearing had prodeeded and intended to rely on a voluntary dismissal under Rule 41 to avoid an unfavorable summary judgment in defendants' favor.

Plaintiff relies upon Wesley v. Bland, 92 N.C. App. 513, 374 S.E.2d 475 (1988), to support his argument that he had not "rested" his case before he attempted to file his voluntary dismissal. In Wesley, the plaintiff attempted to file his voluntary dismissal under Rule 41 at a summary judgment hearing after the defendant rested his case. There, however, the plaintiff attempted to file his motion prior to making any statement at all about the summary judgment motion before the court, and was never given an opportunity to present additional evidence or argue his client's position. Id. at 515, 374 S.E.2d at 476-77. In rever-

sing summary judgment, this Court held:

> For purposes of summary judgment motions, this Court holds that the record must show that plaintiff has been given the opportunity at the hearing to introduce any evidence relating to the motion and to argue his position. Having done so and submitted the matter to the court for determination, plaintiff will then be deemed to have "rested his case" for the purpose of summary judgment and will be precluded thereafter in dismissing his case pursuant to Rule 41 during the pendency of the summary judgment motion.

Id.

In the case sub judice, plaintiff was given the opportunity at the hearing to introduce any evidence and argue his position, and was encouraged to do so by the trial court. Prior to entering its judgment concerning the voluntary dismissal, the trial court offered to withdraw its ruling against plaintiff's voluntary dismissal if plaintiff wanted to present "any other evidence" against the summary judgment motion. Again, under the Wesley analysis,

plaintiff's argument also fails. We find no error.

II.

Plaintiff next argues that the trial court erred in granting defendants' motion for summary judgment because it is contrary to North Carolina constitutional law and violates plaintiff's rights to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution. We disagree.

Again, plaintiff cites no authority and makes no argument concerning his Federal Constitutional allegations, and we deem this portion of plaintiff's assignment of error abandoned. N.C. Rule App. P. 28(b)(5).

Under N.C. Gen. Stat. 1A-1, Rule 56(c) (1990), summary judgment shall be granted "if pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled

to a judgment as a matter of law." This remedy permits the trial court to decide whether a genuine issue of material fact exists; it does not allow the court to decide an issue of fact. Sauls v. Charlotte Liberty Mut. Ins. Co., 62 N.C. App. 533, 535, 303 S.E.2d 358, 360 (1983) (citations omitted).

In a summary judgment proceeding, the trial court must view all evidence presented in the light most favorable to the nonmoving party and determine if there is a triable material issue of fact. Land-of-Sky Regional Council v. Co. of Henderson, 78 N.C. App. 85, 336 S.E.2d 653 (1985), disc. review denied, 316 N.C. 553, 344 S.E.2d 7 (1986); Walker v. Westinghouse Electric Corp., 77 N.C. App. 253, 335 S.E.2d 79 (1985), disc. review denied, 315 N.C. 597, 341 S.E.2d 39 (1986). A defendant is entitled to summary judgment if he establishes that no claim for relief exists or that the plaintiff cannot overcome an affirmative

defense. Rolling Fashion Mart, Inc. v. Mainor 80 N.C. App. 213, 341 S.E.2d 61 (1986).

In its answer to plaintiff's complaint, defendants alleged affirmative defenses of absolute privilege based upon the truth of the allegedly defamatory broadcasts and qualified privilege because the broadcasts were made in good faith, without malice and involving public interest topics. At the summary judgment hearing, defendants also argued absolute privilege because the subject of the broadcasts involved public judicial proceedings. Generally, when a defendant raises an affirmative defense raised on the first time upon motion for summary judgment at the hearing, the affirmative defense will be deemed part of the pleadings. Cooke v. Cooke, 34 N.C. App. 124, 237 S.E.2d 323, disc. review denied, 293 N.C. 740, 241 S.E.2d 513 (1977).

With these general principles in mind, we now turn to the present case. The facts viewed in the light most favorable to plain-

tiff indicate that plaintiff, a medical doctor, voluntarily serves as Medical Director at University Nursing Center (a nursing home) in Greenville. On 19 December 1985 during its 6:00 p.m. and 11:00 p.m. newscasts and on 20 December 1985 during its 8:00 a.m. broadcast, defendants broadcast a news report concerning a malpractice action brought by Josephine House against the plaintiff in the present action. Plaintiff alleged that some of the information in the broadcasts was false and that defendants knew it was false.

On 17 February 1986 during its 6:00 p.m. newscast, WTVD-TV broadcast a story concerning Clarence Ormond, a former resident of University Nursing Center and plaintiff's former patient, which also contained allegedly false, distorted or misleading statements. WNCT aired at least three other broadcasts in February 1986 concerning Clarence Ormond, containing allegedly defamatory statements. Prior to these broadcasts,

plaintiff contacted defendants to discuss the allegations with defendants and requested that any future broadcast material concerning the subject matter be discussed with plaintiff before being broadcast.

On 22 August 1986, WNCT broadcast a news report referring to a legal action in which University Nursing Center and others are defendants, which contained visual material creating the allegedly false impression that plaintiff is a defendant in the action. According to plaintiff, due to the alleged actual malice of these news reports, his property right to practice medicine was damaged.

All lawsuits referred to in the broadcasts are a matter of public record. No judgment has ever been entered in these actions against plaintiff for medical malpractice. Defendants in this action offered plaintiff the opportunity to make a statement on the air in regard to the lawsuits surrounding University Nursing Center.

At the summary judgment hearing, the court considered all pleadings filed by both parties, depositions of Hardee, Lonnie Butler, affidavits of Hardee and plaintiff, video tapes of the alleged defamatory newscasts and the arguments of the parties. The trial court concluded that the December 1985 and August 1986 broadcasts "are protected by absolute privilege in that they are the reporting of a duly constituted judicial proceeding;" that the February 1986 broadcasts are "protected by qualified privilege under the laws of this State in that (they) were reporting of a public concern; further the court finds as a matter of law that the plaintiff has failed to show that such reporting . . . were made out of actual malice." The trial court granted defendants' summary judgment motion because "as a matter of law there is no genuine issue of a material fact that would take these broadcasts out of the fields of absolute and qualified privilege."

A. Absolute Privilege

It is well-settled law in this state that a defamatory statement is absolutely privileged if made in the due course of a judicial proceeding and will not support a defamation action even if it is made with actual malice. Scott v. Veneer Co., 240 N.C. 73, 76, 81 S.E.2d 146, 148 (1954) (citations omitted); Burton v. NCNB, 85 N.C. App. 702, 355 S.E.2d 800 (1987). There is no dispute in the present case that the broadcasts in question contained information made in the pleadings or transcripts of court documents, which are clearly in the due course of a judicial proceeding. Id. (statement made in a judicial pleading is in the "due course of a judicial proceeding"). Therefore, we hold that the trial court did not err in determining that the broadcasts of 19 December 1985 and 22 August 1986 are protected by an absolute privilege.

B. Qualified Privilege

Under Article I, S 14 of the North Carolina Constitution, "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse." This section of our Constitution is considered under the doctrine of "qualified privilege." Johnston v. Time, Inc., 321 F. Supp. 837, (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971).

Whether or not a publication has a qualified privilege is a question of law for the trial court. Towne v. Cope, 32 N.C.App. 660, 233 S.E.2d 624 (1977). Qualified privilege is established when the alleged defamatory publication is made in good faith, the communicating entity has a right, duty or interest to communicate, and the manner and circumstances of the communication are fairly warranted by the occasion and right, duty or interest.

Id. at 663, 233 S.E.2d at 626. "The essential elements thereof are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only." Id. (citations omitted). If the publication falls within the qualified privilege, the plaintiff has the burden of showing that the defendant did not act in good faith and acted with actual malice. Id. at 664, 233 S.E.2d at 627 (citations omitted). See also Ward v. Turcotte, 79 N.C. App. 458, 339 S.E.2d 4444 (1986) (where qualified privilege exists, plaintiff has the burden of proving actual malice).

In order to establish actual malice, plaintiff must provide clear and convincing proof that the alleged defamatory statements were published with knowledge that they were false or with reckless disregard of the truth. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52, 91 S.Ct. 1811, 1824, 29

L.Ed.2d 296, 316-17 (1971). The actual malice standard is applied when a plaintiff alleging defamation is a "public figure." Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Whether or not a person is a public figure depends upon the "nature and extent of a individual's participation in the particular controversy giving rise to the defamation." Gertz, 418 U.S. at 352, 94 S.Ct. at 3013, 41 L. Ed.2d. at 812.

We will now apply these basic principles to the present case. The remaining broadcasts of which plaintiff complains are those of 17 February and 24 February 1986. The 17 February broadcast related to the disappearance of a patient from University Nursing Center and the patient's serious medical problems, which were allegedly ignored or mistreated by the Center's staff. First, the alleged mistreatment of nursing home patients is

clearly a matter of public concern.

Second, we find that plaintiff is a public figure for purposes of the action before us. The pleadings and depositions establish that plaintiff is Director of University Nursing Center and has been involved in ongoing controversies involving the medical treatment of patients and complaints concerning such beginning in early 1985. As Director, plaintiff has offered his services to the public in his official capacity and therefore assumes the risk of negative publicity, as well as being in the position to welcome favorable publicity.

Further, plaintiff voluntarily contacted defendants in his professional capacity in writing and by telephone to discuss the controversies concerning the subject matter of the broadcasts, and gave an interview concerning the broadcasts. By his own admissions, plaintiff has extensive participation in the present defamation

controversy and therefore meets the test under Gertz.

Finally, because we find that this is a matter of public concern and plaintiff is a public figure for these purposes, we must now view the evidence to determine if plaintiff has produced any forecast of evidence that anything defendants reported in the broadcasts was false or with reckless disregard of whether it was false. Viewing the evidence in the light most favorable to plaintiff, we hold that there is no evidence of actual malice. Although plaintiff alleged actual malice in numerous documents, there is simply no evidence of such.

The affidavits and other evidence make a strong showing that most, if not all, of the broadcasts were based upon interviews with former patients and their families and others with knowledge of the problems surrounding University Nursing Center. While the allegations may not be completely accurate, they are not completely

false.

Moreover, there is no evidence that defendants exhibited any evidence of reckless disregard for the truth or falsity of the allegations. The record shows that these news broadcasts were the result of an ongoing investigation into the problems of University Nursing Center publicly reported by other newsmedia. Plaintiff acknowledges, and the record reflects, that defendants offered plaintiff and his superiors many opportunities to make a statement concerning the allegations.

Therefore, we find that defendants acted in good faith in the broadcasts in question and that defendants were protected by a qualified privilege under the laws of this state for the broadcasts of 17 February and 24 February 1986. We hold that the trial court did not err in granting summary judgment to defendants.

III.

Plaintiff's remaining assignment of

error concerns whether the trial court erred in granting defendants' motion for sanctions because it is contrary to state law and violates plaintiff's rights to due process and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution. We find no error.

Plaintiff cites no authority or argument in his brief in support of the Constitutional issues raised in this assignment of error. Therefore, we deem this portion of the error abandoned under Rule 28(b)(5) of the N.C. Rules of Appellate Procedure.

Plaintiff filed his original complaint on 10 February 1987, which was virtually identical to the original complaint. Under Rule 11 of the N.C. Rules of Civil Procedure (effective 1 January 1987),

> (a) Signing by Attorney. -- .
>
> . . . . A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. . . . . The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion,

> or other paper; that to the best of his knowledge,information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of ligation. . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the the person who signed it, ... , an appropriate sanction, which may include an order to pay to the other party . . ., including a reasonable attorney's fee.

N.C. Gen. Stat. 1A-1, Rule 11(a) (1988 Cum. Supp.).

Under Rule 11(a), the trial court does not need to conclude that an attorney or other party has shown subjective bad faith. Turner v. Duke University, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989) (citations omitted). The standard under the rule is one of "objective reasonableness under

the circumstances." Id. The trial court's decision of whether to impose mandatory sanctions under the rule is reviewable de novo/ Id/ at 165, 381 S.E.2d at 714. In reviewing such imposition of sanctions, this Court must determine,

> (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under . . . Rule 11(a).
>
> Finally, in reviewing the appropriateness of the particular sanction imposed, and 'abuse of discretion' standard is proper because ' t he rule's provision that the court "shall impose" sanctions for motions abuses . . . (the court's) discretion on the selection of an appropriate sanction rather than on the decision to impose sanctions.' Westmoreland v. CBS, Inc. 770 F.2d at 1174; see also Daniels v. Montgomery Mut. Ins. Co., 320 N.C. 669, 360 S.E.2d 772 (1987).

Id.

Applying these principles to the present case, we find that the trial court did not err in imposing the sanction of attorney's fees. In its order dated 10 June 1990, the trial court found as fact:

> 7. That the file in this matter is voluminous exhibiting that conscientious efforts were made on behalf of the defendant by the defendant's counsel;
>
> 8. That this ligation was very technical and included multiple depositions, multiple sets of interrogatories, numerous hearings on various motions, all of which required counsel for the defendants to expend numerous hours in court appearances, deposition appearances, research, and preparation for court appearances;
>
> 9. That since February 22, 1987, the defendants have incurred legal expenses in the amount of $13, 450.00;
>
> 10. That the evidence in this case points to the fact that the amended complaint in this matter was under the law spurious and without foundation;
>
> 11. That the complaint was in fact a sham on the court and was not filed in good faith. . . . .

CONCLUSIONS OF LAW

That the complaint was not filed after a reasonable inquiry was made to learn whether or not such "claims" were well-grounded in fact and warranted by existing law and was not signed in good faith;

Further, that the legal expenses incurred by the defendants were reasonable;

Further, that the defendant should be compensated for those attorney fees incurred since February 27, 1987.

> Wherefore, it is hereby ORDERED, ADJUDGED AND DECREED that the plaintiff be sanctioned by this Court, and he is HEREBY ORDERED to pay unto (defendant) the sum of $13,450.00, and judgment shall be duly entered for that sum.

It is clear from the order that the conclusions of law support the judgment and are supported by the findings of fact, which meets the first two prongs of the test set forth in Turner. Moreover, we have reviewed the evidence of record and find that it supports the findings of fact.

First, the amended complaint makes conclusory allegations of false and defamatory statements defendants allegedly reported; however, defendants received their facts

from other sources, and only plaintiff asserted that these sources were unreliable. For example, plaintiff asserted that one source, Lonnie Butler, was unreliable because he could not read or write, and that another, Clarence Ormond, because he had physical and alcohol problems, thus making them inherently unreliable.

Second, plaintiff filed this complaint only after defendants refused to give plaintiff the control he requested over future broadcasts concerning allegations of abuses at University Nursing Center.

Third, plaintiff alleged in the attachments to his amended complaint that defendants could better afford the costs of the litigation because of their "net financial worth." Plaintiff also threatened to file suit in several letters of correspondence to defendants if defendants did not retract the telecasts in question and allow plaintiff limited control over future broadcasts.

The evidence indicates that plaintiff's actions were based upon improper motives and that plaintiff did not investigate the facts before filing his action, that the action was not "well grounded in fact (or) warranted by existion law or a good faith argument, . . ., and that it is not interposed for any improper purpose, ... " Based upon the evidence in the case before us, the trial court was mandated under Rule 11(a) to impose sanctions.

Further, we find that there was sufficient evidence concerning the award of attorney's fees and the amount of such. Defendant Hardee testified at the sanctions hearing on 6 June 1988, as to the amount of attorney's fees incurred, the hours expended in defense efforts and the breakdown of all the charges. We find this supports the finding and conclusion of reasonable attorney's fees of $13,450.00

For the above reasons, we find that under Turner and Rule 11(a), the trial court

did not abuse its discretion in awarding attorney's fees to defendants. Further, we affirm the judgments of 22 January and 10 June 1988.

Affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

Report per Rule 30(e).

Office of the Clerk
Court of Appeals of North Carolina
P.O.Box 2779
Raleigh, North Carolina 27602

Francis E. Dail
Clerk

Telephone
Area Code 919 733-3561

NOTICE OF FILING OF OPINION AND ISSUANCE OF MANDATE

Beginning with the opinion filing date of January 17, 1989, the Court has directed the Clerk to provide, without cost, a copy of the opinion to each attorney of record in the case. However, The Court has further directed that only one (1) copy per law firm will be provided. Accordingly, a copy of the attached opinion for the filing date indicated below is enclosed.

FILING DATE OF OPINION: February 5, 1991

DATE MANDATE WILL BE ISSUED
TO THE TRIAL TRIBUNAL PURSUANT
TO RULE 32(b): February 25, 1991

No. 127P91 THREE-A DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

JOSEPH M. WARD	)	From Pitt
	)	
v	)	(903SC179)
	)	
ROY H. PARK BROADCASTING, CO., INC., ROY HARDEE, ROY H. PARK, CAPITAL CITIES/ABC, INC., NED WARWICK AND WILLIS A. TALTON	)	

****

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Plaintiff in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Defendant; and upon consideration of the petition for discretionary review of the decision of the North Carolina Court of Appeals, filed by Plaintiff pursuant to G.S. 7A-31, the following order

was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

> "Allowed by order of the Court in conference, this the 3rd day of April 1991.
>
> s/Webb, J.
> For the Court"

The Petition for Discretionary Review is:

> "Denied by order of the Court in conference, this the 3rd day of April 1991.
>
> s/Webb, J.
> For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of April 1991.

s/Peggy N. Byrd
PEGGY N. BYRD
Assistant Clerk

Copy to:

North Carolina Court of Appeals

Mr. Joseph M. Ward, pro se

Messrs. James T. Cheatham and Ernie K. Murray, Attorneys at Law, For the Defendants

Mr. Ralph A. White, Appellate Court Reporter
West Publishing Company
Mead Data Corportion

Filed
2-27-87
Pitt C.
S/L. GODLEY
assist. C.S.C.

FILE NO. 86 CVS 2243

FILM NO.

IN THE GENERAL COURT OF JUSTICE

NORTH CAROLINA

PITT COUNTY

SUPERIOR COURT DIVISION

JOSEPH M. WARD

VS.

ORDER

ROY H. PARK BROADCASTING COMPANY, INC., ROY HARDEE, ROY H. PARK, CAPITAL CITIES-ABC, INC., NED WARWICK, WILLIS A. TALTON

THIS CAUSE coming on to be heard before the undersigned Judge presiding at the February 23, 1987, nonjury session of Pitt County Civil Superior Court on motion of the defendant Roy H. Park, Individually, to dismiss the complaint, as amended, filed herein as to him pursuant to Rule 12(b)(6) of the Rules of Civil Procedure for reason that said complaint, as amended, fails to state a claim upon which relief can be granted and it appearing to the Court that said motion should be allowed and that the defendant Roy H. Park's motion for sanctions

should be denied;

IT IS THEREFORE ORDERED that the complaint, as amended, is hereby dismissed as to the individual defendant Roy H. Park.

IT IS FURTHER ORDERED that the defendant Roy H. Park's motion for sanctions be and the same is hereby denied.

This 24 day of February, 1987.

S/THOMAS S. WATTS
Honorable Thomas S. Watts
Judge Presiding

FILE NO. 86 CVS 224_

FILM NO.

NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

PITT COUNTY SUPERIOR COURT DIVISION

JOSEPH M. WARD

VS. ORDER BY CONSENT

ROY H. PARK BROADCASTING COMPANY, INC. ROY HARDEE, ROY H. PARK, CAPITAL CITIES-ABC, INC. NED WARWICK AND WILLIS A. TALTON

THIS CAUSE coming on to be heard before the undersigned Judge assigned to and holding Courts in the third Judicial District on motion of the defendants Roy H. Park Broadcasting Company, Inc. and Roy Hardee to dismiss and/or strike that portion of plaintiff's pleading dated March 27, 1987 which is designated "Counterclaim" and it appearing to the Court that the parties, by consent, have agreed that this motion will be denied and that the defendants will have twenty (20) days from the date

hereof to file responsive pleadings to said "Counterclaim."

NOW THEREFORE IT IS ORDERED BY CONSENT that the motion of the defendants Roy H. Park Broadcasting Company, Inc. and Roy Hardee to dismiss motion to strike and for sanctions filed on April 23, 1987 is hereby denied and the defendants are given twenty (20) days in which to file responsive pleadings to said "Counterclaim"

This 23th day of April, 1987.

S/J LEWIS

Judge Presiding

CONSENTED TO:

S/JOSEPH M. WARD
Joseph M. Ward, Plaintiff

S/J T. CHEATHAM
James T. Cheatham, Attorney
for Defendants, Roy H. Park
Broadcasting Company, Inc.
and Roy Hardee

NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE

PITT COUNTY — SUPERIOR COURT DIVISION
FILE NO. 86-CVS-2243

JOSEPH M. WARD
Plaintiff

v

AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

ROY H. PARK BROADCASTING CO. INC., ROY HARDEE, ROY H. PARK, CAPITAL CITIES-ABC, INC., NED WARWICK, WILLIS A. TALTON
Defendants

NOW COMES the Plaintiff before responsive pleadings by any of the Defendants and amends his Complaint. The Plaintiff, complaining of the Defendants, alleges and says:

THE PARTIES

1. Plaintiff is a resident of Pitt County, North Carolina. He is a physician duly licensed to practice medicine in North Carolina. He is engaged in the practice of family medicine in Pitt County and serves as Medical Director at University Nursing Center, Greenville, N.C.

2. Defendant Roy H. Park Broadcasting Co., Inc., is a North Carolina corporation that owns and operates WNCT-TV, a television

station with its offices and studios located in Pitt County, N.C.

3. Defendant Roy Hardee, hereinafter referred to as Defendant Hardee at times, is a resident of Pitt County and is employed as News Director at WNCT-TV.

4. Defendant Roy H. Park, hereinafter referred to as Defendant Park at times, is a resident of Ithaca, New York. On information and belief, Defendant Park, owns all or most of the stock of Roy H. Park Broadcasting, Co., Inc. and serves as chairman of the board and chief executive officer of that corporation.

5. Defendant Capital Cities-ABC, Inc., is a foreign corporation and operates television station WTVD whose offices and studios are located in Durham County, N.C.

6. Defendant Ned Warwick, hereinafter referred to as Defendant Warwick at times, is a resident of Philadelphia, Pennsylvania and was in the past employed as News Director at television station WTVD.

7. Defendant Willis Talton is a resident of Pitt County, North Carolina. He is a self employed attorney.

THE FACTS

8. On December 19, 1985 during its 6 P.M. and 11 P.M. newscasts and December 20, 1985 during its 8 A.M. newscast, WNCT broadcasted a news report concerning a malpractice action brought by Josephine House against the Plaintiff in this action and others. This news report contained multiple statements which were false and/or distorted and/or misleading and which also defamed University Nursing Center and/or the Plaintiff in this action. Some of these statements were made by the WNCT's reporter (s) and some were made by Josephine House's attorney, Defendant Talton. Most, if not all, of the false and/or distorted and/or misleading statements referred to herein which defame the Plaintiff are specified in a letter from the Plaintiff

addressed to Defendant Hardee dated December 23, 1985. This letter, ATTACHMENT A, is incorporated herein by reference as a part of this Complaint.

9. At the time the WNCT news report referred to under # 8 hereinabove was broadcast, Defendant Hardee knew, or should have known, that some of the material used falsely defames the Plaintiff.

10. On Monday, February 17, 1986 during its 6 P.M. newscast, WTVD broadcasted a story concerning the plight of Clarence Ormand, a former resident of University Nursing Center, Greenville, N.C. and a former patient of the Plaintiff. This broadcast contained numerous false and/or distorted and/or misleading statements and/or omissions. A number of these items falsely defame the Plaintiff and/or University Nursing Center, including rebroadcast of some of the false statements uttered by Defendant Talton which were broadcasted during the WNCT

Newscasts referred to in paragraph 8 hereinabove. A rehash of some of the false defamatory material referred to herein was broadcast by WTVD during its 6 P.M. newscast on February 18, 1986. Most, if not all, of the false and/or distorted and/or misleading statements referred to herein which defame the Plaintiff are specified in a letter from the Plaintiff addressed to Defendant Warwick dated February 24, 1986. This letter, ATTACHMENT B, is incorporated herein by reference as a part of this Complaint.

11. Some of the material (s) which falsely defames the Plaintiff and which was used in the news telecast described under #10 hereinabove was supplied to WTVD by WNCT with the approval of WNCT's News Director, Defendant Hardee. At that point in time, Defendant Hardee knew, or should have known, that some of this material falsely defames the Plaintiff.

12. On information and belief,

Lonnie Butler, a resident of Laurinburg, N.C. solicited coverage of the plight of Clarence Ormond by WTVD and told WTVD about the Josephine House malpractice action. On information and belief, WTVD then solicited materials concerning the Josephine House malpractice action from WNCT.

13. On information and belief, transportation for Clarence Ormond and Lonnie Butler from a Raleigh motel to the North Carolina State Capitol, where they were taped by the WTVD crew, and then to Rex Hospital, where more TV taping was done, was provided by a WTVD television crew using a WTVD vehicle.

14. On Monday, February 17, 1986 during its 6 P.M. news program, WNCT telecasted a story concerning the plight of Clarence Ormond. On February 24, 1986 during the 6 P.M. newscast, and on February 25, 1986 during the noon newscast, a followup story concerning Clarence Ormond

was telecasted by WNCT. These newscasts contained numerous false and/or distorted and/or misleading statements and/or omissions. A number of these items falsely defame the Plaintiff and/or University Nursing Center. Most, if not all, of the false and/or distorted and/or misleading statements and/or omissions which falsely defame the Plaintiff and/or University Nursing Center are specified in a letter from the Plaintiff addressed to Defendant Hardee dated February 24, 1986. This letter, ATTACHMENT C is incorporated herein by reference as part of this Complaint.

15. At the points in time the items which falsely defame the Plaintiff referred to under # 14 hereinabove were telecast, Defendant Hardee and some other WNCT employees knew, or should have known, that part of the items falsely defame the Plaintiff.

16. On information and belief, part of the items described under # 14

hereinabove which falsely defame the Plaintiff were supplied to WNCT by WTVD with the knowledge and consent of WTVD's News Director, Defendant Warwick. At the point in time this material was furnished to WNCT, some WTVD employees knew, or should have known, that some of the items falsely defame the Plaintiff.

17. In the letter described under #14 above (ATTACHMENT C), the Plaintiff, because of the multiple acts involving false defamation on the part of WNCT, strongly requested that any future broadcast material concerning medical care at University Nursing Center and/or patient care by the Plaintiff be discussed with the Plaintiff before being broadcast. This request was not honored.

18. On August 22, 1986 during its 6 P.M. newscast, WNCT telecasted a news report referring to a legal action in which University Nursing Center and others are defendants. Almost nothing in the news report was accurate. The report contains visual material which

creates the false impression that the Plaintiff is a defendant in that action when, in fact, at that point in time the Plainfiff was not a defendant in any legal action. This and several other items in the news report falsely defame the Plaintiff. Most, if not all, of the false and/or distorted and/or misleading statements contained in this broadcast are specified in a letter from the Plaintiff addressed to Defendant Hardee dated August 27, 1986. This letter, ATTACHMENT D, is incorporated herein by reference as part of this Complaint. Shortly after the news report was telecasted, the Plaintiff tried to call Defendant Hardee at WNCT. The Plaintiff was told that Mr. Hardee was busy and left a message for Mr. Hardee to call him back. The Plaintiff never received a return call from Defendant Hardee.

19. At the times the acts and omissions by Defendant Hardee and/or news team members of WNCT and/or Defendant

Warwick and/or news team members of WTVD referred to in this Complaint occurred,each of such employees was acting as an employee and agent of either the owner of WNCT, Roy H. Park Broadcasting Co., Inc. and/or the owner of WTVD, Capital Cities-ABC, Inc. and/or a previous owner of WTVD, Capital Cities Communications, Inc.

20. Roy H. Park Broadcasting Co., Inc. is responsible for the wrongful acts and/or omissions of this corporation's employees and/or agents referred to in this Complaint as Respondeat Superior. Based on information and belief, Defendant Roy H. Park is responsible for the wrongful acts and/or omissions referred to in this Complaint on the part of Roy H. Park Broadcasting Co., Inc. and/or employees and/or agents of this corporation as the sole or dominant stockholder of that corporation and/or as the chairman of the board and chie executive officer of that corporation. Capital Cities-ABC is responsible for the wrongful acts and/or omissions of that corporation's employees

and/or agents referred to in the Complaint in this action as Respondeat Superior and is responsible for the wrongful acts and/or omissions, if any, of employees and/or agents of Capital Cities Communication, Inc. referred to in this Complaint by having assumed such responsibility upon the merger of Capital Cities Communication, Inc. and American Broadcasting Company, Inc. to form Capital Cities-ABC, Inc.

21. WNCT, Defendant Hardee, Defendant Park, WTVD, Defendant Warwick and the news teams of both WNCT and WTVD have an obligation to the public which requires that, if they elect to report an event or an occurrence, they make a reasonable effort to report such event or occurrence with reasonable accuracy and with reasonable fairness to all persons and other entities involved. On information and belief, due at least partly to efforts to maintain or increase advertising revenues, none of the herein named persons or

television news teams fulfilled this obligation. On informaion and belief, Defendant Hardee's failure to fulfill this obligation was due partly to his disapproval of the Plaintiff's refusal to accept Medicaid payment for medical services provided to Defendant Hardee's mother-in-law by the Plaintiff.

22. As Medical Director of University Nursing Center since 1982 and as the attending physician of 50-60 residents of that facility, the Plaintiff has been and is so closely identified with University Nursing Center that any statement falsely defamatory to University Nursing Center concerning care provided to residents by that facility which is widely published can be fairly construed to be falsely defamatory to the Plaintiff. This set of circumstances has existed at least since January 1, 1985.

FIRST CLAIM FOR RELIEF

23. This first claim for relief is against all defendants in this action. The Plaintiff has served at least 5 days notice

on WNCT and WTVD before filing this action, pursuant to North Carolina General Statute 99-1 (b).

24. The Plaintiff realleges and incorporates herein by reference paragraphs 1-22 above, ATTACHMENT A, ATTACHMENT B, ATTACHMENT C and ATTACHMENT D.

25. The broadcast of false and/or distorted and/or misleading statements referred to herein above paragraphs 8, 10, 14 and 18 and/or described in ATTACHMENTS A, B, C and D falsely defames the Plaintiff. The failure to broadcast statements which should have been broadcast if any news report (s) concerning the involved matters was to be undertaken falsely defames the Plaintiff. The false defamation (s) of the Plaintiff demean the professional reputation of the Plaintiff and libel him per se.

26. Each of the acts and/or omissions referred to in paragraph # 25 herein above which are libelous to the Plaintiff

were carried out and/or omitted due to actual malice on the part of Defendant Willis Talton, and/or Defendant Roy H. Park Broadcasting Co., Inc. and/or Defendant Roy H. Park, and/or Defendant Roy Hardee and/or some members of the WNCT news staff and/or due to actual malice on the part of Defendant Capital Communications-ABC, Inc. and/or Capital Cities Communications and/or Defendant Ned Warwick and/or some members of the WTVD news staff. Each of the acts and/or omissions which libel the Plaintiff was carried out and/or omitted with wanton and willful disregard of the rights of the Plaintiff.

27. The actual malice and wanton and willful disregard for the Plaintiff's rights referred to in paragraph 26 hereinabove are aggravating circumstances in this action. The broadcast of statements related to the Josephine House action which falsely defame the Plaintiff as referred to in paragraphs 8 and 9 hereinabove, when Defendant

Hardee and some WNCT news staff members knew, or should have known, that the statements were probably false, is an aggravating circumstance in this first claim for relief. The use of a WTVD vehicle to transfer Clarence Ormond from a Raleigh motel to the North Carolina State Capitol and then to Rex Hospital with television taping at each of these locations constitutes an aggravating circumstance in this First Claim For Relief. The telecast of visual material showing Clarence Ormond's decubitus ulcers is an aggravating circumstance in this First Claim For Relief.

28. As a result of the libelous acts and/or omissions referred to in paragraph 26 hereinabove, the Plaintiff has suffered special damages in the form of lost professional fees, cost of secretarial help and office supplies. Further, the Plaintiff has also suffered general damages including damage to his professional reputation, the loss of future professional fees, increased migraine

headaches, increased esophageal reflux, increased gout and severe emotional stress. The Plaintiff is entitled to punitive damages for the injuries he has suffered in connection with this claim.

SECOND CLAIM FOR RELIEF

29. This Second Claim For Relief is against all Defendants in this action.

30. The Plaintiff realleges and incorporates herein by reference paragraphs # 1-28 above.

31. Due to the wrongful acts and/or omissions referred to in paragraphs 8, 10, 11, 13, 14, 15, 16, 17, 18 and in ATTACHMENTS A, B, C and D, interference with the Plaintiff's personal property right to practice medicine has occurred.

32. The interference with the Plaintiff's personal property right to practice medicine referred to in paragraph 31 hereinabove occurred due to actual malice on the

part of Defendant Willis Talton and/or Defendant Roy Park Broadcasting Co.,Inc. and/or Defendant Roy Hardee and/or Defendant Roy H. Park and/or some members of the WNCT news staff and/or Defendant Capital Cities-ABC and/or Capital Cities Communications, Inc. and/or Defendant Ned Warwick and/or some members of the WTVD news staff. Each of the acts and or omissions which interfere with the Plaintiff's right to practice medicine was carried out with wanton and willful disregard of the rights of the Plaintiff.

33. All of the acts and/or omissions referred to in paragraph 27 hereinabove as being aggravating circumstances in the First Claim For Relief are aggravating circumstances in this Second Claim For Relief.

34. As a result of the wrongful acts and/or omissions in paragraph 31 above which interfere with the Plaintiff's right to practice medicine, the Plaintiff has suffered special damage in the form of lost professional fees, secretarial expense, and the ex-

pense of office supplies. Further, the Plaintiff has suffered general damages including damage to his professional reputation, the loss of future professional fees, increased migraine headaches, increased esophageal reflux, increased gout and severe emotional distress. The Plaintiff is entitled to punitive damages for the injuries he has suffered in connection with this claim.

DEMAND FOR JURY TRIAL

35. The Plaintiff demands a jury trial as to all matters properly triable thereby.

WHEREFORE, the Plaintiff prays the Court:

a. That a judgement in favor of the Plaintiff be entered against Defendant Roy Hardee and Defendant Roy H. Park in the sum of Four Thousand One Hundred Dollars ($ 4,100.00) in special damages, and in the sum of Five Million Dollars ($5,000,000.00) in general damages and in the sum of Ten

Million Dollars ($10,000,000.00) in punitive damages.

b. That a judgement in favor of the Plaintiff be entered against Defendant Capital Cities-ABC, Inc. and Defendant Ned Warwick in the sum of Two Thousand, Two Hundred Dollars ($2,200.00) in special damages and in the sum of Ten Million ($10,0^0,000.00) in punitive damages.

c. That a judgement in favor of the Plaintiff be entered against Defendant Willis Talton in the sum of Ten Dollars ($10 00) in special damages, Ten Dollars ($10.00) in general damages and Ten Dollars ($10.00) in punitive damages.

d. To grant a jury trial in this action.

e. That the Defendants other than Defendant Willis Talton be required to pay the costs of this action.

f. For such other relief as to the Court may seem just and proper.

This is the 10th day of February, 1987.

S/Joseph M. Ward
Joseph M. Ward
121 West Power Street
Ayden, N.C. 28513
Telephone: (919) 746-3191

Plaintiff

NORTH CAROLINA

PITT COUNTY

JOSEPH M. WARD, first being duly sworn, deposes and says:

That he is the Plaintiff in the foregoing action; that he has read the foregoing Amended Complaint And Demand For Jury Trial and that the contents of said Amended Complaint And Demand For Jury Trial are true to his own knowledge except as to those matters stated on information and belief and as to those matters he believes them to be true.

S/Joseph M. Ward

Sworn to and subscribed before me this the 10th day of February, 1987.

S/Eliza J. Richardson
NOTARY PUBLIC

My Commission Expires:
December 17th, 1987

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Amended Complaint And Demand For Jury Trial by depositing a copy thereof in an envelope bearing sufficient postage in the United States Mail at Ayden, North Carolina, addressed to the following persons at the following addresses which are the last addresses known to me:

James T. Cheatham
202 E. Arlington Blvd.
Suite C
Greenville, N.C. 27834
Attorney for Defendants
Roy H. Park Broadcasting, Inc.
Roy Hardee

Edmund D. Milam, Jr.
Suite 100, Chancellor Bldg.
100 E. Parrish Street
Durham, N.C. 27701
Attorney for Defendants
Capital Cities-ABC, Inc.
Ned Warwick

Willis A. Talton
311 S. Evans Street
P.O. Box 390
Greenville, N.C. 27835

This is the 10th day of February, 1987.

S/Joseph M. Ward
Joseph M. Ward
121 West Power Street
Ayden, N.C. 28513
Telephone: (919) 746-3191
Plaintiff

AYDEN CLINIC, P.A.

121 WEST POWER STREET

AYDEN, NORTH CAROLINA 28513

J. M. WARD, M.D. (919) 746-3191

December 23, 1985

Mr. Roy Hardee
News Director
WNCT
Television Station
Post Office Box 898
Greenville, N.C. 27834

Dear Mr. Hardee:

On December 19, 1985, during your station's 6 P.M. and 11 P.M. news programs and on December 20, 1985 at about 8 A.M., a report concerning a malpractice action against me was televised on WNCT.

The above broadcasts contained material which is clearly defamatory concerning my actions and/or inactions. I was accused of malpractice for having provided improper medical care for Josephine House

while she was a patient at University Nursing Center. This, in itself, is false. I provided good medical care for Mrs. House and I am not guilty of medical malpractice in connection with her care.

The above broadcasts contained a statement by your announcers that Mrs. House apparently received no treatment for injuries incurred in an incident which was described in the above named broadcasts by Willis A. Talton. I contend that this statement is false and defamatory.

Mr. Talton's television description of Mrs. House slipping from a chair sounds reasonably accurate based on my own information and knowledge. His contention that the fracture occurred at that time cannot be proven in my opinion and I contend that it is probably false and is defamatory. Mr. Talton's television description of the events following the above

described incident contains a false statement and gross distortions. His statement that I did not examine Mrs. House is false and I contend that it is defamatory. His statement that I only saw the patient one time between the time of the above incident and the time the fracture was found distorts the truth regarding the medical care I provided for her. His statement concerning Mrs. House calling out to me and my having stuck my head in Mrs. House's door is at least a distortion which conveys a false defamatory impression concerning my actions and/or inactions. It may be false in its entirety (I do not recall the alleged conversation). Mr. Talton's statement that Mrs. House was going to tell me that her leg was broken does not fit with documented evidence contained in Mrs. House's record. This statement at least distorts the correctness of my action in connection with this alleged incident. The statement may

be false.

It is my contention that any public statement by Mr. Talton regarding damages sought other than the statement that Mrs. House was seeking damages in excess of $10,000 was improper.

I hereby demand that a full and fair correction, apology and retraction be published in the same manner as the original material. This letter is intended to serve as the written notice required at least 5 days before an action is instituted, pursuant to North Carolina General Statute 99-1 (b).

I hereby, request and, if allowed by law, I demand that you afford me the opportunity to view and/or copy all of the material you have broadcast related to alleged problems at University Nursing Center plus all of the material you have broadcast during the last six months concerning a malpractice action against

University Nursing Center, Mr. Kyle Dilday and myself brought in the name of Josephine House.

Further, I hereby request and, if allowed by law, I demand that any future planned broadcasts material concerning the above malpractice action be discussed with me before broadcast and that I be given fair opportunity to broadcast a rebuttal to such material during the same program (s) in which the material is broadcasted.

Thank you for your attention to this matter.

Sincerely,

S/Joseph M. Ward
Joseph M. Ward, M.D.

JMW/vbg

AYDEN CLINIC, P.A.

121 WEST POWER STREET

AYDEN, NORTH CAROLINA 28513

J.M. WARD, M.D. (919) 746-3191

February 24, 1986

Mr. Ned Warwick
News Director
WTVD, Channel 11
Post Office Box 2009
Durham, N.C. 27702

Dear Mr. Warwick:

On Monday, February 17, 1986 during the 6 P.M. newscast, WTVD broadcast a story concerning the plight of Clarence Ormond, a former resident of University Nursing Center, Greenville, N.C. Your broadcast contained so many false and/or distorted and/or misleading statements and/or omissions that I hardly know where to start. I consider it a masterpiece of senational journalism.

First, the fact that Mr. Ormond's

health condition is pitifully bad does not mean that University Nursing Center is a bad nursing home. I have visited eight nursing homes during the last several years. It is my opinion that University Nursing Center is as good as any of these and better than most of them.

Decubitus ulcers defy mankind. They occur at home, in rest homes, nursing homes and hospitals, including teaching hospitals. While good nursing care is important in their prevention, it offers no guarantee that decubiti, including bad decubiti, will not occur.

Clarence Ormond, in the past, has a history of severe alcohol abuse. He was struck by a car while walking on a road. Whether or not he was intoxicated at that time, I do not know. I suggest that you ask him. In any event, he was left paraplegic. Additionally, his injuries included a ruptured thoracic aorta. The hoarseness he has is secondary to an injury to

the recurrent laryngeal nerve in connection with his aortic injury. Also, he has severe scarring of his face from acne, another of those disorders for which medical science has not devised perfect therapy.

If I were a television news reporter looking for a sensational story that would attract a large audience, Clarence Ormond would fit the bill well. While sensational stories do improve viewing ratings, they frequently present a biased and distorted picture. Clearly, any contention that Clarence Ormond's health problems are the fault of University Nursing Center is absurd. Under the circumstances at hand, such a claim was not, and is not, worthy of having been reported. The showing of his decubitus ulcers along with such a claim is clearly a disgrace. The average layman has no real knowledge about the problem of decubitus ulcers. Further, it

is very difficult to educate him or her regarding this problem and such an education is not likely to occur during a five minute newscast, even if the reporters are medical experts.

Your newscast contained a statement that Lonnie Butler cannot read. If that is true, I certainly do not think he is a suitable teacher and/or authority to inform your audience concerning the proper treatment of decubitus ulcers. I am not impressed that he should be considered an authority on any subject.

I serve as Medical Director at University Nursing Center. As such, I am an advisor and serve on several committees. This is done on a retainer basis. I am not an employee of the nursing home. Additionaly, I am engaged in private practice at University Nursing Center, as are a number of other physicians. I receive no reimbursement from University Nursing

Center for patient care. I am free to refuse to accept a particular resident as a patient or to terminate my contract with any particular resident with proper notice. Clarence Ormond was my private patient at University Nursing Center.

Since I have been well identified in the public eye as an agent of University Nursing Center in an atmosphere of heavy media exposure in recent months, I contend that it is fair to construe any criticism of medical and/or nursing care at that facility to be, at least indirectly, a criticism of me. With this in mind I think it is time for us to get down to the business at hand.

It is my contention that the above news broadcast was in poor taste and contained many false statements and distortions and was by its basic content defamatory to both University Nursing Center and myself. It is my contention that the story

should not have been attempted without much more investigation by your staff.

The statement in your telecast in which you allege that Lonnie Butler claims that negligence and squalid conditions at University Nursing Center caused Mr. Ormond's problems should not have been telecast. The claim is false and it is my contention that you should have at least been suspicious that it was not true. The claim is defamatory to both University Nursing Center and myself.

All statements in your telecast which even as much as suggest that a significant portion of Clarence Ormond's health problems are the fault of University Nursing Center are false and defamatory to both the nursing home and myself.

It is my contention that the showing of Mr. Ormond's decubiti during your telecast was not only inappropriate but also distorts the truth and is defamatory to

both University Nursing Center and myself.

All of Lonnie Butler's statements regarding the nursing and/or medical care provided Mr. Ormond by University Nursing Center are false and/or distorted and are defamatory to both University Nursing Center and myself.

It is my contention that your use of Clarence Ormond's defective voice on your broadcast with him not saying anything other than the fact that he does not want to die is in itself a distortion and that such distortion creates a derogatory impression concerning the nursing home and myself, thereby defaming University Nursing Center and myself.

It is my contention that the showing of Lonnie Butler turning over a large set of papers to someone at the Governor's office without identifying the contents of the papers distorts the truth and is defamatory to both the nursing center and myself.

It is my contention that your showing of a legal complaint listing University Nursing Center, Kyle Dilday and myself as defendants in a legal action distorts the allegations in your telecast concerning Clarence Ormond and is defamatory to both the nursing home and myself.

The statement in your telecast made by Mr. Willis Talton claiming that I did not visit Mrs. Josephine House but one time during a three week period following an incident which she alleges to have caused a fracture is in fact, a grossly distorted statement which, I contend, accuses me by implication of having failed to make appropriate visits to attend to Mrs. House's medical needs following the above discribed incident. Any accusation that I failed to make appropriate visits to Mrs. House following the above incident is, in fact, false and defamatory to me and to University Nursing Center.

Your statement that Mrs. Josephine House suffered a hip fracture at University Nursing Center is, in fact, false. Josephine House did, in fact, suffer a different major injury during the time she resided at University Nursing Center. Whether this injury occurred in the nursing home or while she was on a visit away from the nursing home is not clearly apparent at this point in time. Along with the other material telecast, it is my contention that any false statement broadcast concerning the injury to Josephine House is defamatory to the nursing home and myself.

It is my contention that the showing of a brief segment regarding the problems related to the resigning of the local advisory nursing home committee distorts the true picture regarding that committee and distorts the primary story concerning Clarence Ormond's care at University

Nursing Center. I contend that its inclusion in the telecast is defamatory to both the nursing home and myself.

It is my contention that your announcer's reporting other recent patient care problems at University Nursing Center without pointing out that such problems are not major and are common at all nursing homes, rest homes, and hospitals, even at the better ones such as University Nursing Center, distorts the truth regarding University Nursing Center and is defamatory to both University Nursing Center and myself.

WTVD elected to rehash the February 17, 1986 telecast on the 6 P.M. News program on February 18, 1986. Let me make it clear that I contend that any statement or video showing which was telecast during your 6 P.M. February 17, 1986 News program and concerning which I complained above as being false or distorted and defamatory was

just as false and/or distorted and defamatory when WTVD rehashed it on February 18, 1986 during the 6 P.M. News program.

I hereby demand that you retract the above two telecasts in their entirety and publish an apology and the retraction in the same manner as the original material. Under the circumstances, I do not consider anything less to be fair. Further, even this will not fully correct the damage done.

As an alternative, I demand that an itemized full and fair correction, apology and retraction be published in the same manner as the original material.

This letter is intended to serve as the written notice required at least 5 days before an action is instituted, pursuant to North Carolina General Statute 99-1 (b).

I hereby request and, if allowed by law, I demand that any future planned

broadcast material concerning medical care at University Nursing Center and/or patient care by myself be discussed with me before broadcast and that I be given a fair opportunity to rebut such material during the same program (s) in which the material is telecasted.

Thank you for your attention to this matter.

Sincerely,

S/JOSEPH M. WARD
Joseph M. Ward, M.D.

JMW/vbg

AYDEN CLINIC, P.A.

121 WEST POWER STREET

AYDEN, NORTH CAROLINA 28513

J.M. WARD, M.D. (919) 746-3191

March 4, 1986

Mr. Roy Hardee
WNCT
Post Office Box 898
Greenville, N.C. 27834

Dear Mr. Hardee:

On Monday, February 17, 1986 during its 6 P.M. news program, WNCT telecasted a story concerning the plight of Clarence Ormond, a former resident at University Nursing Center. On February 24, 1986 during the 6 P.M. news program and on February 25, 1986 during the noon news program, a followup story was telecasted by WNCT. These broadcasts contained so many false and/or distorted and/or misleading statements and/or omissions that

ATTACHMENT C

I hardly know where to start. If WNCT had originated the story, I would have considered the story a masterpiece of sensational journalism. As things stand, I consider the telecasts to be a misguided effort to maintain the unbridled power of the media. As one who carries the blood line of one of the signers of the Constitution, I do not buy the idea that the media should have absolute freedom to assault the character of honorable institutions or individuals.

The fact that Mr. Ormond's health condition is pitifully bad does not mean that University Nursing Center is a bad nursing home. I have visited eight nursing homes during the last several years. It is my opinion that University Nursing Center is as good as any of these and better than most of them.

Decubitus ulcers defy mankind. They occur at home, in rest homes, nursing

homes and hospitals, including teaching hospitals. While good nursing care is important in their prevention, it offers no guarantee that decubiti, including bad decubiti, will not occur.

Clarence Ormond, in the past, has a history of severe alcohol abuse. He was struck by a car while on a road. He was intoxicated at the time. He was left paraplegic. Additionally, his injuries included a ruptured thoracic aorta. The hoarseness he has is secondary to an injury to the recurrent laryngeal nerve in connection with his aortic injury. Also, he has severe scarring of his face from acne, another of those disorders for which medical science has not devised perfect therapy.

The survival of Clarence Ormond following his injuries is in itself almost miraculous. A lot of people contributed to his survival. Some of those persons

were his physicians. Despite the fact that some physicians do make too much money, I find the mounting media assault on the medical profession to be cruel and in poor taste. After all, some businessmen, including your station's owner, make too much money.

If I were a television reporter looking for a sensational story that would attract a large audience, Clarence Ormond would fit the bill well. While sensational stories do improve viewing ratings, they frequently present a biased and distorted picture. Clearly, any contention that Clarence Ormond's health problems are the fault of University Nursing Center is absurd. Under the circumstances at hand, such a claim was not, and is not, worthy of having been reported. The showing of his decubitus ulcers along with such a claim is clearly a disgrace. The average layman has no real knowledge about the problem of decubitus ulcers. Further, it

is very difficult to educate him or her regarding this problem and such an education is not likely to occur during a fifteen minute newscast, even if the reporters are medical experts.

WTVD's original telecast contained a statement that Lonnie Butler cannot read. If that is true, I certainly do not think he is a suitable teacher and/or authority to inform your audience concerning the causes and proper treatment of decubitus ulcers. I am not impressed that he should be considered an authority on any subject.

A very nice elderly lady was in my office shortly after WNCT ran the followup story concerning Lonnie Butler and the plight of Clarence Ormond. She had seen the news report. She thought that the decubiti were terrible. She said they must have been caused by poor care at the nursing home. I then told her about the young man 2 doors down the hall who is a quadraplegic.

Perhaps you remember me telling you about this. To refresh your memory, this young man was admitted to University Nursing Center in 1980. He had a small decubitus ulcer on admission. This healed promptly. He has never had another decubitus ulcer.

After I told the nice lady about this above described young man and further told her that he had the same nurses and attendants as did Clarence Ormond, I asked her again what she thought all of this meant. She replied that Clarence Ormond's decubiti could not have been the fault of University Nursing Center. As a person who tries to be fair and objective, I told her that this set of circumstances strongly supported the contention that Clarence Ormond's decubiti were not due to neglect at University Nursing Center, but did not absolutely prove this.

How many thousands of people are there who saw the telecast but do not know

about the nice quadraplegic man with no decubiti two doors down the hall? Telling this story during another broadcast (s) will not get to all of them.

Clearly, I warned you that any showing of Mr. Ormond's decubitus ulcers on television would be misconstrued by a large segment of the viewing public.

Clearly, the discussion you had with Kyle Dilday, Mickey Herrin, Patsy and myself on Monday, February 17, 1986 should have at least alerted you to the strong possibility that University Nursing Center and myslef were being deliberately mistreated and abused and that it was highly possible that the Clarence Ormond saga was part of such abuse and mistreatment. If I had sat in your position and you in mine and if I had regarded you, Kyle Dilday, Mickey Herrin and Patsy Ward as honorable people, I would have backed off and never televised the story until much later down

the road after the real truth comes to the surface.

One of the most irritating things about this mess is a statement that Mamie Joe Harrell made to me on the telephone on February 21, 1986. She said that the WNCT news staff even went to the medical literature in order to be sure that the program would be fair and objective regarding decubitus ulcers. As a battle scarred veteran of nights spent in dimly lit homes delivering babies plus thousands and thousands of hours spent doing other difficult and often unpleasant tasks in the medical field, I resent the idea that a few TV reporters can sit down with a few textbooks for a few days and then come forth as medical experts.

You have really left me with no choice. I usually try to keep my word. I told you that I would bring a legal action against WNCT if Clarence Ormond's decubitus ulcers

were shown on television.

It is my understanding that Mr. Roy Parks owns WNCT and that he is very wealthy, perhaps having a net financial worth as high as $500,000,000. He should hardly miss the money spent on legal fees in my planned action, even if these run as high as $100,000 or even $200,000. On the other hand, I am a simple country doctor who has never made a lot of money. It is very difficult to win from the media in a libel and/or slander action. I will probably not be able to get legal representation on a contingency basis. Reasonably, I cannot afford to spend most of my very limited resources on attorneys' fees.

The problems described above are enough to make an honorable person with a valid claim against a TV station back down unless such person is wealthy or funded by others. I have neither of these benefits. But let me assure you that I am a determined individual. I did not get my combat

decorations by turning and running and I do not plan to turn and run now. So let us get on with the business at hand.

It is my contention that, since heavy media publicity has identified me as a member of the management team at University Nursing Center, any statement defamatory to University Nursing Center regarding medical care provided by that institution is also defamatory to me.

The news report regarding the tragic plight of Clarence Ormond which was telecast by WNCT during the 6 P.M. news program on February 24, 1986 and again during the 12 noon news program on February 25, 1986 contains false statements and distortions which I consider defamatory to University Nursing Center and myself. It is my contention that these news telecasts were in poor taste and that the material used contains many false statements and distortions and is by its basic content

defamatory to both University Nursing Center and myself. It is my contention that the story should not have been attempted without much more investigation by your staff.

It is my contention that the statement, attributed to Clarence Ormond's mother, that Lonnie Butler is a long time friend of Clarence Ormond is false. I contend that this statement also creates a false impression that Lonnie Butler had a right to intervene in the affairs of Clarence Ormond.

It is my contention that your reporter's statement that Lonnie Butler received a phone call from Clarence Ormond's cousin in which she expressed high concern about Mr. Ormond's condition may or may not be true, but in either event distorts the truth and is defamatory to University Nursing Center and myself.

It is my contention that Lonnie Butler's statement which indicates that he

has been fighting University Nursing Center for approximately two years is false, but I sure do hope you can prove it to be true. That might help unsort some of the mystery that has confronted University Nursing Center, Mr. Kyle Dilday and myself. The statement distorts the truth regarding University Nursing Center as does your reporter's statement that Mr. Butler claims that he was shocked. I contend that all of this is defamatory to both University Nursing Center and myself.

It is my contention that the statement of Lonnie Butler that he had known that Clarence Ormond had bedsores for approximately 16 to 18 months is false, but again, I sure hope it is true. I contend that the statement by Lonnie Butler indicating that as he would come to Greenville he would see Clarence Ormond's bedsores increase worse and worse is, in fact, false and is defamatory to both

University Nursing Center and myself. It is my contention that the statement of Lonnie Butler that he begged Clarence Ormond to let him (Lonnie Butler) take Ormond to another doctor and get a second opinion is false and Butler's statement quoting Ormond as saying "no, the doctors say the ulcers were real small and healing up and that he (Ormond) did not need to go" is false and defamatory to University Nursing Center and myself.

Lonnie Butler's statement that Clarence Ormond should have been put in the hospital when his bedsores were small is, in fact, false and is defamatory to both University Nursing Center and myself as is Lonnie Butler's statement indicating that Clarence Ormond's "_____ whole rear is rotten." It is my contention that Lonnie Butler's statement "they said he did have gangrene, he did have infection and without help he is going to die" is a

distortion of the truth regarding what a Raleigh physician (s) told him regarding Clarence Ormond's condition and is defamatory to both University Nursing Center and myself.

It is my contention that the statement indicating that Lydia Moore was along with Lonnie Butler when he was admitted to Rex Hospital is probably false and, if false, distorts the truth regarding Clarence Ormond's relationship with his mother. When included the other statements I contend to be false and defamatory, I consider this statement to also be defamatory to University Nursing Center and myself.

It is my contention that your announcer's statement that News Center 9 had now learned that Clarence Ormond's legs were indeed likely to be amputated without indicating that I was the first one who gave you expert information regarding this and without stating that it was

hoped that only one lower extremity would be amputated and without explaining the purpose of the amputation (s) distorts the truth and is defamatory to University Nursing Center and myself. It is my contention that your reporter's statement that "the question is how did Clarence Ormond's bedsores deteriorate to such a condition that amputation was necessary," distorts the truth and is defamatory to both University Nursing Center and myself.

It is my contention that the statement, attributed to Vivian Moore, contending that Clarence Ormond had no bedsores while in Durham or while at home, if such a statement was made, is false and defamatory to University Nursing Center and myself.

It is my contention that your reporter's statement that somehow Clarence Ormond's condition worsened is in itself a distortion since it is known how Clarene

Ormond's condition worsened and since the worsening was due to a very common complication seen in paraplegic patients. Further, your failure to include the fact that Clarence Ormond became very ill with this complication and was admitted to Pitt County Memorial Hospital because of it and was later transferred to the nursing home distorts the truth. I further contend that such distortions are defamatory to University Nursing Center and myself.

It is my contention that use of the words "claims" and "admits" in connection with statements I made to WNCT which were used in the telecasts distorts the truth in a setting where you had a very good reason to believe I was telling the truth and no good reason to believe that I was not telling the truth. I contend that such usage is defamatory to University Nursing Center and myself.

It is my contention that your reporter's

statement quoting my statement that I felt that both of Mr. Ormond's legs should be amputated without describing why such a procedure is sometimes done when, in fact, I had explained to you and the reporter why this is sometimes done is a distortion of the truth and is false and defamatory to University Nursing Center and myself.

The statement of Clarence Ormond's mother that he was having trouble deciding regarding possible amputations immediately followed by a statement that when he was taken to Raleigh, he did not know "_____ he was in this bad a shape" leaves me a little befuddled. I can understand how she would make such a statement but I really think that you understand that the two statements are in conflict. How could one be trying to decide whether or not to have both legs amputated without being aware that he was in bad shape?

It is my contention that Vivian

Moore's statement that Clarence Ormond, after going to Raleigh, decided that he wanted to have the amputations because he wanted to live, without including in close proximity to Mrs. Moore's statement, a reminder that I was the first one who recommended consideration of possible amputations and without including a statement that Clarence Ormond may, in fact, lose his life if such surgery is done is a distortion of the truth and is defamatory to University Nursing Center and myself.

Your statement concerning James Emmett Highsmith distorts the truth regarding the health problems of James Emmett Highsmith and I contend that it defames both University Nursing Center and myself. Also, it is my contention that the story is, for all practical purposes, irrevelant to the story regarding Clarence Ormond's very serious and unfortunate health problems and that its inclusion only serves to further defame

both University Nursing Center and myself.

It is my contention that your reporter's questions "but should Clarence Ormond have been hospitalized earlier, was he given the proper care and how did his bed sores deteriorate to such a severe condition?" plus your reporter's statement that these are questions that you do not have answers to constitute distortion of the truth and such distortion is defamatory to University Nursing Center and myself.

Lonnie Butler's statement that he tried all over Pitt County from the health department to the medical team and that he had to drive Clarence Ormond to Raleigh to see a doctor is, in fact, at least partly false and probably false in its entirety and is defamatory to University Nursing Center and myself.

It is my contention that Dr. Willson's statement distorts the truth in that it infers that a complaint against a physician

(s) will be filed with the Pitt County Medical Society when, in fact, such a complaint is not justified and probably will not be filed unless filed with an ulterior motive. I further contend that the inclusion of this statement in your news report is defamatory to University Nursing Center and myself.

It is my contention that the use of Clarence Ormond's defective voice on your telecast with him not saying anything other than the fact that he does not want to die is in itself a distortion and that such distortion creates a derogatory impression concerning the nursing home and myself, thereby defaming University Nursing Center and myself.

It is my contention that the showing of Mr. Ormond's decubiti during your telecast was not only inappropriate but also distorts the truth and is defamatory to both University Nursing Center and myself.

It is my contention that all of the telecast material concerning which I have complained of hereinabove as being defamatory, false, distorted or misrepresenting the facts which was also included in your 6 P.M. newscast on February 17, 1986 is just as defamatory and false or distorted and/or misrepresents the facts just as badly as such material does in the February 24, 1986 WNCT 6 P.M. newscast. Therefore, I do not feel that it is necessary for me to restate those items in this letter.

On Monday, March 3, 1986, I talked to Mamie Joe Harrell in your absence. I told her I wanted to view the tape of the above mentioned February 17, 1986 telecast since I had not been able to see the newscast itself and since I had seen the tape only once under stressful circumstances. Mrs. Harrell told me that WNCT probably had not saved the tape. I made it very clear that I believe the tape has been saved. She

apparently resented my contention. In any event, she attempted what I consider a diversionary maneuver by accusing me of rudeness. Clearly, the main issue is not whether or not I can, or do, become rude when pushed too hard. The real issue is whether or not your telecasts were, and in the future will be, appropriate.

In the above conversation, Mamie Joe Harrell told me that she would give you the message that I want to view the February 17, 1986 6 P.M. newscast tape. I have not heard from you about this matter. Therefore, I consider the necessary legal notice regarding material included in this telecast which I may claim to be false, distorted, or defamatory to have been waived by WNCT and yourself.

I hereby demand that you retract the above two telecasts in their entirety and publish an apology and the retraction in the same manner as the original material.

Under the circumstances, I do not consider anything less to be fair. Further, even this will not fully correct the damage done.

As an alternative, I demand that an itemized full and fair correction, apology and retraction be published in the same manner as the original material.

This letter is intended to serve as the written notice required at least 5 days before an action is entered pursuant to North Carolina General Statute 99-1 (b).

I hereby request and, if allowed by law, I demand that any future broadcast material concerning medical care at University Nursing Center and/or patient care by myself be discussed with me before broadcast and that I be given a fair opportunity to rebut such material during the same program (s) in which the material is telecasted. Further, I request and, if

allowed by law, demand that you save the tapes of all telecasts, past and future, relating to medical care provided by University Nursing Center and/or relating in any way to me.

Thank you for your attention to this matter.

Sincerely,

S/JOSEPH M. WARD
Joseph M. Ward, M.D.

JMW/vbg

AYDEN CLINIC, P.A.
121 WEST POWER STREET
AYDEN, NORTH CAROLINA 28513
J.M. WARD, M.D. (919) 746-3191

August 27, 1986

Mr. Roy Hardee
News Director
WNCT
Post Office Box 898
Greenville, N.C. 27834

Dear Mr. Hardee:

As a teaser before WNCT's 6 P.M. newscast on Friday, August 22, 1986, it is my understanding that a reporter made a statement to the effect that 120 persons might be about to become involved in a lawsuit and they were not even aware of this at that point in time. Yesterday, Mr. Allen Hoffman was unable to show me a tape of the teaser. He did show me a text that he stated was used for the teaser. Based on the text shown me, the statement broadcast was that 120 people could be named

Plaintiffs in a law suit against a Greenville nursing center. If either of these statements was broadcast, it falsely defamed me when considered in conjunction with a newscast report which followed. During the newscast, a WNCT news reporter stated, in effect, that the Court was being petitioned to expand a legal action alleging abuse of residents at University Nursing Center so as to represent all of the residents at University Nursing Center. This alone is a false or distorted statement. While part of this was being reported, the video portion of the news report displayed a portion of a court document with my name appearing in a space reserved for defendants. The combination of the audio and the video, aided by the teaser that went before, falsely defames me by conveying the false impression that I am a defendant in a legal action along with University Nursing Center. Further, the

statements that 120 people might become Plaintiffs, along with my name being displayed as a defendant on the video portion of the telecast, falsely defames me. Further, it falsely defames me by conveying the false impression that an attempt is being made to enlarge the Josephine House malpractice action so that the Plaintiff will somehow represent all residents at University Nursing Center. Further, it falsely defames me by stating that the lawsuit stems from allegations of abuse of patients.

Immediately following the above described news report regarding University Nursing Center, a report on the opening of a new day care activities center for the elderly was given. This item was one of bliss. To me, the reports and their timing appear designed to give a contrast between a bad old private nursing home and a good new day care center sponsored by

the Methodist Church and the East Carolina School of Medicine. It is my contention that the telecast of this news report in close proximity to the news report concerning University Nursing Center falsey defamed me or increases and aggravates the false defamations that had just been broadcast in the previous news report.

I hereby demand that you retract the above described teaser statement and both of the above described newscast reports in their entirety and publish an apology and the retraction in the same manner as the original material. Under the circumstances, I do not consider anything less to be fair. Further, even this will not correct the damage done.

As an alternative, I hereby demand that an itemized full and fair correction, apology and retraction concerning the false and/or distorted portions of the August 22, 1986 newscast described above

be published in the same manner as the original material.

This letter is intended to serve as the written notice required at least 5 days before an action is entered pursuant to North Carolina General Statute 99-1 (b).

I hereby request and, if allowed by law, I demand that any future broadcast material concerning medical care at University Nursing Center and/or patient care by myself be discussed with me before being broadcasted and that I be given a fair opportunity to rebut such material during the same program (s) in which the material is televised. Further, I request and, if allowed by law, demand that you save the tapes of all telecasts, past and future, relating to medical care provided by University Nursing Center and/or relating in any way to me.

Thank you for your attention to this matter.

Sincerely,

S/JOSEPH M. WARD
Joseph M. Ward, M.D.

JMW/vbg

FILE NO. 86 CVS 2243

FILM NO.

NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE

PITT COUNTY SUPERIOR COURT DIVISION

JOSEPH M. WARD

VS.

DEFENDANT'S MOTION TO DISMISS, ANSWER, COUNTERCLAIM AND DE- FOR JURY TRAIL

ROY H. PARK BROADCASTING CO., INC., ROY HARDEE, ROY H. PARK, CAPITAL CITIES-ABC, INC., NED WARWICK, WILLIS A. TALTON

The defendants, Roy H. Park Broadcasting, Inc. and Roy Hardee, for answer to the complaint filed herein, allege and say:

FIRST DEFENSE

These defendants, through counsel, move the Court, pursuant to Rule 12(b)(6) of the Rules of Civil Procedure, to dismiss the complaint for failure to state a claim for which relief can be granted.

SECOND DEFENSE

These defendants, specifically answering the complaint filed herein, allege and say:

I

The allegations of paragraph 1 are not denied.

II

That as to the allegations of paragraph 2, it is alleged that Roy H. Park Broadcasting, Inc., not Roy H. Park Broadcasting Co., Inc., is a North Carolina corporation which owns and operates WNCT-TV, a television station with its principal offices and studios in Greenville, Pitt County, North Carolina.

III

The allegations of paragraph 3 are admitted.

IV

That as to the allegations of

paragraph 4, it is admitted that Roy H. Park is a resident of Ithaca, New York; all other allegations of paragraph 4 are denied.

V

The allegations of paragraphs 5, 6 and 7 are not denied.

VI

That as to the allegations of paragraph 8, it is admitted that the defendant, Roy H. Park Broadcasting, Inc. T/A WNCT-TV, broadcasts a newscast at 6:00 p.m. and 11:00 p.m. on December 19, 1985 and a newscast on the morning of December 20, 1985 concerning a civil action by Josephine D. House against the University Nursing Center, Kyle W. Dilday and the plaintiff; all other allegations are denied; these defendants admit having received plaintiff's Exhibit "A;" these defendants, in response to plaintiff's Exhibit "A," offered

the plaintiff the opportunity to rebut the allegations made by Mrs. House through her attorney, Mr. Talton, as set forth in Exhibit "A" of this answer which is attached and incorporated herein.

VII

The allegations of paragraph 9 are denied.

VIII

These answering defendants have neither knowledge nor information sufficient to answer the allegations of paragraph 10 and therefore deny same.

IX

That as to the allegations of paragraph 11, it is admitted that the news department of WNCT-TV furnished some video-tape to WTVD at their request; all other allegations are denied.

X

That as to the allegations of paragraph 12, it is admitted that the defendant, Roy H. Park Broadcasting, Inc. T/A

WNCT-TV, at the request of WTVD-TV, Durham, furnished certain news information concerning the University Nursing Center to WTVD; all other allegations are denied.

XI

That as to the allegations of paragraph 13, these defendants do not have sufficient information and therefore deny same.

XII

That as to the allegations of paragraph 14, it is admitted that the defendant, Roy H. Park Broadcasting, Inc. T/A WNCT-TV, broadcast news programs on February 17, 1986 at 6:00 p.m., on February 24, 1986 at 6:00 p.m. and on February 25, 1986 at 12:00 noon concerning one Clarence Ormond and University Nursing Center; all other allegations are denied; these defendants admit having received plaintiff's Exhibit "C."

XIII

The allegations of paragraphs

15 and 16 are denied.

XIV

As to the allegations of paragraph 17, these defendants do not deny that they refused to allow the plaintiff to edit their newscast concerning the University Nursing Home, Clarence Ormond or the plaintiff; all other allegations are denied. By way of further answer these defendants attach a letter written to the plaintiff dated the 21st day of March, 1986, which is incorporated herein by reference as Exhibit "B" and which gave the plaintiff an opportunity to make a statement regarding said news coverage.

XV

That as to the allegations of paragraph 18, it is admitted that the defendant, Roy H. Park Broadcasting, Inc. T/A WNCT-TV, broadcasts a news report referring to a legal action against the University Nursing Center and others on August 22,

1986. Any reference to Dr. Ward is denied.

It is also not denied that the plaintiff, on various occasions, talked with the defendant, Roy Hardee; all other allegations are denied; these defendants admit having received plaintiff's Exhibit "D."

XVI

That as to the allegations of paragraph 19, it is admitted that at the times alleged, the defendant, Roy Hardee, was an employee and News Director for the defendant, Roy H. Park Broadcasting, Inc. T/A WNCT-TV; that as to the other allegations, these defendants do not have sufficient information and therefore deny same.

XVII

That as to the allegations of paragraph 20, it is admitted that the defendant, Roy Hardee, was at all times hereinbefore alleged and still is an employee and News Director of the defendant, Roy

H. Park Broadcasting, Inc. T/A WNCT-TV; it is denied that the said Roy Hardee committed any wrongful acts; as to the indivi-dkual defendant Roy H. Park, it is denied that he owns any stock per se in Roy H. Park Broadcasting, Inc.,; it is further denied that Mr. Park knew of or had any knowledge of any news broadcasts whatsoever by WNCT-TV; that as to the other allegations, these defendants do not have sufficient information and therefore deny same.

XVIII

That as to the allegations of paragraph 21, these answering defendants allege and say that they have, at all times, fulfilled their legal and moral obligations to the public and thus deny the allegations by the plaintiff otherwise.

XIX

That as to the allegations of paragraph 22, it is admitted that the plain-

tiff, by reason of his being Medical Director of the University Nursing Center and undertaking to be its spokesperson, has become a public figure; all other allegations are denied.

ANSWER TO PLAINTIFF'S FIRST CLAIM FOR RELIEF

I

That as to the allegations of paragraph 23, these defendants admit having received five days' notice, pursuant to North Carolina General Statute 99-1(b); as to the other allegations, these defendants do not have sufficient information and therefore deny same.

II

These defendants reallege and incorporate herein by reference paragraph 1-22 above.

III

The allegations of paragraphs 25, 26, 27 and 28 are denied.

ANSWER TO PLAINTIFF'S SECOND CLAIM FOR RELIEF

I

These defendants reallege and incorporate herein by reference paragraphs 1 through 28 above.

II

The allegations of paragraphs 31, 32, 33 and 34 are denied.

THIRD DEFENSE

The plaintiff has shown himself as a "public figure" and any communications concerning the plaintiff are entitled to First Amendment protection and these defendants plead this as a bar to recovery by the plaintiff.

FOURTH DEFENSE

All the broadcasts by these defendants referred to in plaintiff's complaint were qualifiedly privileged, made in good faith, without malice and involving topics of public interest which these defendants had a duty to report and make fair comment upon and this is plead in bar to plaintiff's recovery against these defendants.

FIFTH DEFENSE

That all matters and things broadcast by Roy H. Park Broadcasting, Inc. T/A WNCT-TV and complained of by plaintiff were, as these answering defendants are advised, believe and therefore allege, true in any and all respects whatsoever, and on account thereof said publications were absolutely privileged under and pursuant to the laws of the State of North Carolina and Rule 8(c) of the North Carolina Rules of Civil Procedure and all of which is plead in bar of any recovery whatsoever by plaintiff.

SIXTH DEFENSE

That the notice required by North Carolina General Stature 99-1 was not timely and properly given by plaintiff prior to the institution of this suit and on account thereof these defendants plead same in bar of any recovery whatsoever by plaintiff.

SEVENTH DEFENSE

BY WAY OF FURTHER ANSWER AND DEFENSE THESE ANSWERING DEFENDANTS ALLEGE AND SAY:

Plaintiff has failed to show specific facts to show that a genuine issue exists as to the allegation of "actual malice" and these defendants further contend that plaintiff was offered access to broadcast time in connection with the controversies, subject to reasonable time limits, and these defendants made a good faith effort to be fair and objective to each party in broadcasting the controversies; that defendants are under no duty to broadcast information demanded by plaintiff in connection with any controversy; that the defendants did, at all times, make available to plaintiff the opportunity to comment on and rebut any broadcasts.

COUNTERCLAIM

The plaintiff's alleged cause

of action against these answering defendants is without any basis in law or in fact and was, as these answering defendants are advised, believe and therefore allege, instituted for the sole purpose of harrassing each of these answering defendants and causing them to undergo legal expense(s) in an amount not yet determined.

That on account of the matters and things alleged herein, these answering defendants allege and say that there is a complete absence of a justifiable issue of either law or fact raised by the complaint filed by plaintiff and that under the provisions of North Carolina General Statute 6-21.5 they are entitled to recover from plaintiff any and all amounts expended by them in the defense of this proceeding including, but not restricted to, attorney's fees and court costs in such amount(s) as may be determined at or subsequent to the trial of this proceeding.

WHEREFORE, HAVING ANSWERED, THESE DEFENDANTS PRAY:

1. That plaintiff have and recover nothing from either or both of these answering defendants.

2. That these defendants have and recover from plaintiff any and all amounts expended by them in the defense of this proceeding including, but not restricted to, attorney's fees as set forth in their counterclaim.

3. For trial by jury as by law allowed.

4. That the plaintiff be taxed with the costs.

5. For such other and further relief as the nature of the case demands.

This 12 day of February, 1987.

JAMES T. CHEATHAM, P.A.

By: S/J T. CHEATHAM
James T. Cheatham
Attorney for Defendants
Roy H. Park Broadcasting, Inc.
T/A WNCT-TV and
Roy Hardee

202 E. Arlington Blvd.,
Suite C
Greenville, NC 27858
Telephone: (919)
355-5400

WNCT-TV 9

P.O. Box 898

Greenville, N.C. 27835-0898

(919) 756-3180

EX A

December 31, 1985

Dr. J. M. Ward
Ayden Clinic, P.A.
121 West Power Street
Ayden, NC 28513

Dear Joe:

This will acknowledge your letter of December 23 regarding news programs aired by this station on December 19 and 20 concerning a lawsuit filed against University Nursing Center, Inc., Kyle Dilday, and you by Mrs. Josephine House.

I think you will agree that this suit, once filed, is a matter of public record and subject to news reporting by us or any other news media. I assure you that this station has always attempted to give fair and accurate news coverage and this story

is, I believe, no exception. As you recall, several months ago when the county Nursing Home Committee resigned, you called me at home one Sunday morning to discuss, at length, that story and I offered to allow you to make a statement on the air if you wished. In fact, before the story ran, your employer, Mr. Dilday, was asked by our reporter whether he wished to make any statement and he declined. On at least two occasions since the current story, I have personally offered you the opportunity to rebut Mrs. House's allegations made through her attorney, Mr. Talton.

Since receipt of your letter, I have researched and found the video of Mr. Talton's statement made to our reporters and broadcast on the 19th and 20th of December. During normal business hours and at a mutually convenient time, I will make this available for you to view and, if desired,

make a statement concerning his remarks and/or the pending lawsuit by Mrs. House.

In conclusion, we are unable to determine that we have any reason to retract statements made by us in the above newscasts. In the future, we will continue, when your name is mentioned in this pending lawsuit or any other suits, to give you an opportunity to make a statement. This station does not censor or control the comments of a third party, in this case, Mr. Talton, who represents Mrs. House.

Joe, as I have told you on previous occasions, you have the opportunity to respond as you see fit. Feel free to call me at any time to discuss this.

Finally, we appreciate your concern and assure you we will always strive to make

our news coverage as fair and accurate as possible.

Sincerely,

Roy Hardee
News Director

dls

WNCT-TV 9 EX-B

P.O. Box 898

Greenville, N.C. 27835-0898

(919) 756-3180

March 21, 1986

Dr. J. M. Ward
Ayden Clinic, P.A.
121 West Power Street
Ayden, NC 28513

Dear Joe:

In reference to your letter to me dated March 4, 1986, I reiterate our previous notifications that we will give you an opportunity to make a statement about any news items we air regarding you and/or the University Nursing Home.

Such statements must necessarily, however, be within a time frame that is reasonable for a television news format.

If there are any questions regarding this, please feel free to contact me.

Sincerely,

Roy Hardee
News Director

dls

NORTH CAROLINA

PITT COUNTY

FILE NO. 86-CVS-2243

FILM NO.

IN THE GENERAL COURT
OF JUSTICE

JOSEPH M. WARD

VS.

SUPERIOR COURT DIVISION

MOTION, ANSWER AND
COUNTERCLAIM TO AMEND-
ED COMPLAINT

ROY H. PARK BROADCASTING,
INC., ROY HARDEE, CAPITAL
CITIES-ABC, INC., NED WARWICK
WILLIS A. TALTON

The defendants Roy H. Park Broadcasting, Inc. and Roy Hardee, for Answer to the Amended Complaint filed herein on February 10, 1987, say:

FIRST DEFENSE

These defendants, through counsel, move the Court, pursuant to Rule 12(b) (6) or the Rules of Civil Procedure, to dismiss the complaint for failure to state a claim for which relief can be granted.

SECOND DEFENSE

The defendants adopt and incorporate herein their Answer filed on February 12, 1987, to the plaintiff's original Complaint as to each and every allegation of the Amended Complaint and further adopt and incorporate herein each Defense stated therein.

COUNTERCLAIM

The plaintiff's alleged cause of action against these answering defendants is without any basis in law or in fact and was, as these answering defendants are advised, believe and therefore allege, instituted for the sole pupose of harassing each of these answering defendants and causing them to undergo legal expense(s) in an amount not yet determined.

That on account of the matters and things alleged herein, these answering defendants allege and say that there is a complete absence of a justiciable issue of either law or fact raised by the complaint

filed by plaintiff and that under the provisions of North Carolina General Statute 6-21.5 they are entitled to recover from plaintiff any and all amounts expended by them in the defense of this proceeding including, but not restricted to, attorney's fees and court costs in such amount(s) as may be determined at or subsequent to the trial of this proceeding.

WHEREFORE, having answered, these defendants pray:

1. That the plainfiff have and recover nothing from these answering defendants.

2. That these defendants have and recover from plaintiff on their Counterclaim any and all amounts expended by them in the defense of this proceeding including, but not limited to, attorney's fees.

3. For trial by jury as by law allowed.

4. That the plaintiff be taxed with the costs.

5. For such other and further relief as the nature of the case demands.

This 27 day of February, 1987.

JAMES T. CHEATHAM,P.A.

By:S/J T. CHEATHAM
James T. Cheatham
Attorney for defendants
Roy H. Park Broadcasting, Inc.
and Roy Hardee
202 E. Arlington Blvd., Suite C
Greenville, NC 27858
Tel: (919) 355-5400

CERTIFICATE OF SERVICE
I certify that a copy of the foreging Motion, answer Counterclaim to Amended Complaint was served on all parties by mailing a copy to all attorneys of record, postage prepaid,
27 day of February, 1987
JAMES T. CHEATHAM, P.A.

BY: s/ J T. CHEATHAM

NORTH CAROLINA

PITT COUNTY

IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
FILE NO. 86-CVS-2243

JOSEPH M. WARD
Plaintiff

vs

REPLY TO COUNTERCLAIM OF DEFENDANTS ROY H. PARK BROADCASTIN CO., INC. and ROY HARDEE, COUNTERCLAIM

ROY H. PARK BROADCASTING CO., INC. ROY HARDEE, ROY H. PARK, CAPITAL CITIES-ABE, INC., NED WARWICK, WILLIS A. TALTON
Defendants

NOW COMES the Plaintiff, pursuant to Rule 12 and Rule 13 of the North Carolina Rules Of Civil Procedure and replies to the Counterclaim denominated as such which was filed and served on the Plaintiff by Defendant Roy H. Park Broadcasting Co., Inc. and Defendant Roy Hardee as part of these Defendants' Answer to the Complaint and as part of these Defendants' Answer to the Amended Complaint.

FIRST DEFENSE

Pursuant to Rule 12 (b) (6) of the North Carolina Rules Of Civil Procedure, the Plaintiff moves the Court to dismiss the Counterclaim filed by Defendant Roy H. Park Broadcasting Co. Inc. and Defendant Roy Hardee for failure to state a claim for which relief can be granted.

SECOND DEFENSE

The Plaintiff, specifically answering the hereinabove described Counterclaim of Defendant Roy H. Park Broadcasting Co., Inc. and Defendant Roy Hardee says:

1. The Plaintiff denies the allegations contained in the first paragraph of the Counterclaim. The Plaintiff entered this action against these defendants because the acts and/or omissions of these defendants have damaged the Plaintiff and because the Plaintiff is informed, advised, and believes that he has a just claim against these de-

fendants. Specifically, the Plaintiff denies that any purpose of harrassment of these defendants and/or causing these defendants to undergo legal expenses was involved in the institution of this action.

2. The allegations contained in the second paragraph of the Counterclaim are denied. Further, the Plaintiff has been advised, is informed and believes that North Carolina General Statute 6-21.5 contains no provision for filing of a counterclaim seeking to recover any and all amounts expended by the defense in an action. The Plaintiff alleges and says that North Carolina General Statute 6-21.5 provides that the prevailing party in a civil action, upon its own motion, may be awarded a reasonable attorney's fee if the Court finds that there was a complete absense of a justiciable issue of either law or fact raised by the losing party in any pleading.

COUNTERCLAIM

1. The Plaintiff realleges and, incorporates in this Counterclaim as if set out herein in full paragraphs 1-35 of the Amended complaint and the Prayer For Judgement contained in the Amended Complaint.

2. Due to the wrongful acts and/or omissions of the defendants in this action which are referred to in paragraphs 8, 10, 11, 13, 14, 15, 17, 18 and in Attachments A, B, C, and D of the Amended Complaint filed in this action, interference with contracts in existence between the Plaintiff and some of his patients and/or with the contract in existence between University Nursing Center, Inc. and Plaintiff occurred.

3. The interference with the Plaintiff's contracts referred to in paragraph 2 hereinabove occurred due to actual malice on the part of Defendant Willis Talton and/or Defendant Roy Park Broadcasting Co., Inc. and/or Defendant Roy Hardee and/or some members of the WNCT news staff and/or Defen-

dant Capital Cities-ABC, Inc.,and/or Capital Cities Communications, Inc. and/or Defendant Ned Warwick and/or some members of the WTVD news staff. Each of the acts and/or omissions which interfered with contracts in existence between the Plaintiff and some of his patients and/or the contract in existence between the Plaintiff and University Nursing Center was carried out with wanton and willful disregard for the rights of the Plaintiff.

4. All of the acts and/or omissions referred to in paragraph 2 of the Amended Complaint as being aggravating circumstances in the First Claim For Relief are aggravating circumstances in this Counterclaim.

5. As a result of the wrongful acts and/or omissions referred to in paragraph 2 hereinabove, the Plaintiff has sufferred special damage in the form of lost professional fees, cost of secretarial help

and office supplies. Further, the Plaintiff has also suffered general damages including damage to his professional reputation, the loss of future professional fees, increased migraine headaches, increased esophageal reflux, increased gout and severe emotional distress. The Plaintiff is entitled to punitive damages for the injuries he has suffered in connection with this claim.

6. At the time the Amended Complaint in this action was filed, the Plaintiff was not advised and/or informed and did not believe that he had grounds for a claim of interference with contract(s) against these defendants.

WHEREFORE, the Plaintiff prays the Court:

a. For the same relief sought in the Prayer For Judgement in the Amended Complaint filed in this action.

b. For such other relief as to the Court may seem just and proper.

This the 27th day of March, 1987.

S/JOSEPH M. WARD

Joseph M. Ward
121 West Power Street
Ayden, N.C. 28513
Telephone: (919) 746-3191
Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing REPLY TO COUNTERCLAIM OF DEFENDANTS ROY H. PARK BROADCASTING CO., INC. and ROY HARDEE, COUNTERCLAIM by depositing a copy thereof in an envelope bearing sufficient postage in the United States Mail at Ayden, North Carolina addressed to the following persons at the following addresses which are the last addresses known to me:

James T. Cheatham
202 E. Arlington Blvd.
Suite C
Greenville, N.C. 27834
Attorney for Defendants
Roy H. Park Broadcasting, Inc.
Roy Hardee

Edmund D. Milam, Jr.
Suite 100, Chancellor Building
100 E. Parrish Street
Durham, N.C. 27701
Attorney for Defendants
Capital Cities-ABC, Inc.
Ned Warwick

Richard B. Conely
Post Office Box 279
Fuquay Varina, N.C.
27526
Attorney for Defendant
Willis A. Talton

William S. Britt
Post Office Box 1525
Lumberton, N.C. 28359
Attorney for Defendant
Willis A. Talton

This the 27th day of March, 1987.

S/JOSEPH M. WARD
Joseph M. Ward
121 West Power Street
Ayden, North Carolina
28513
Telephone: (919) 746-
3191
Plaintiff

FILE NO. 86-CVS-2243

FILM NO.

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

PITT COUNTY

SUPERIOR COURT DIVISION

JOSEPH M. WARD

VS.

REPLY AND MOTION

ROY H. PARK BROADCASTING, INC., ROY HARDEE, CAPITAL CITIES-ABC, INC., NED WARWICK, WILLIS A. TALTON

FIRST DEFENSE

The defendants Roy H. Park Broadcasting, Inc. and Roy Hardee, for Reply to the pleading designated "Counterclaim" filed by the plaintiff on March 27, 1987, say:

I

That for answer to Paragraph 1, these defendants adopt and incorporate herein their Answer filed on February 12, 1987.

II

That the allegations of Paragraphs 2, 3, 4 and 5 are denied.

III

That as to the allegations of Paragraph 6, these defendants say and contend that the plaintiff neither at the time of the filing of his "Amended" Complaint nor now has any legal basis for claim of contractual interference against these defendants.

SECOND DEFENSE

These defendants, in response to this Counterclaim, adopt and incorporate all the defenses stated in their Answer filed on February 12, 1987.

THIRD DEFENSE AND MOTION

The plaintiff's alleged Counterclaim against these answering defendants for contractual interference is without any basis in law or in fact and was, as these answering defendants are advised, believe and therefore allege, instituted for the sole purpose of harassing each of these answering defendants and causing them to undergo legal

expense(s) in an amount not yet determined.

That on account of the matters and things alleged herein, these answering defendants allege and say that there is a complete absence of a justiciable issue of either law or fact raised by the Counterclaim filed by plaintiff for contractual interference and that under the provisions of North Carolina General Statute 6-21.5 they are entitled to recover from plaintiff any and all amounts expended by them in the defense of this proceeding including, but not restricted to, attorney's fees and court costs in such amount(s) as may be determined at or subsequent to the trial of this proceeding.

WHEREFORE, having answered, these defendants pray:

1. That the plaintiff have and recover nothing from these answering defendants on his Counterclaim filed on March 27, 1987 or any of the plaintiff's claims.

2. That these defendants have and recover from plaintiff on their Motion herein any and all amounts expended by them in the defense of this proceeding including, but not limited to, attorney's fees.

3. For trial by jury as by law allowed.

4. That the plaintiff be taxed with the costs.

5. For such other and further relief as the nature of the case demands.

This 13 day of May, 1987.

JAMES T. CHEATHAM, P.A.

By: S/J T. CHEATHAM
James T. Cheatham
Attorney for defendants
Roy H. Park Broadcasting, Inc.
and Roy Hardee
202 E. Arlington Blvd.
Suite C
Greenville, NC 27858
Tel: (919) 355-5400

FILE NO. 86 CVS 2243

FILM NO.

NORTH CAROLINA — IN THE GENERAL COURT

PITT COUNTY — OF JUSTICE

SUPERIOR COURT DIVISION

JOSEPH M. WARD
Plaintiff

vs. NOTICE OF DISMISSAL

ROY H. PARK BROADCASTING CO., INC.
ROY HARDEE, ROY H. PARK, CAPITAL
CITIES/ABC, INC., NED WARWICK,
and WILLIS A. TALTON
Defendants

Pursuant to the provisions of Rule 41(a)(1) of the North Carolina Rules of Civil Procedure, the plaintiff voluntarily dismisses all of his claims herein against the defendants Roy H. Park Broadcasting, Inc. and Roy Hardee, without prejudice.

This the 21st day of Jan. 1988.

S/JOSEPH M. WARD
Joseph M. Ward
121 West Power Street
Ayden, N.C. 28513
Telephone: (919) 746-3191
Plaintiff

(3)

91-182

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER 1991 TERM

****

JOSEPH M. WARD

PETITIONER

V

ROY H. PARK BROADCASTING CO., INC. AND ROY HARDEE

RESPONDENTS

****

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE NORTH CAROLINA SUPREME COURT

****

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

JAMES T. CHEATHAM
ERNIE K. MURRAY
COUNSEL OF RECORD
POYNER & SPRUILL
202 E. ARLINGTON BLVD., SUITE C
GREENVILLE, N.C. 27858
TELEPHONE: (919) 355-5400

13

QUESTION(S) PRESENTED FOR REVIEW

The Respondents disagree with Petitioner's presentation of the Questions Presented For Review and submit in lieu thereof, the following:

I. WHETHER THE ACTIONS OF THE APPELLATE COURTS OF THE STATE OF NORTH CAROLINA AFFIRMING THE DISMISSAL OF THE PETITIONER'S CLAIMS CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT?

II. WHETHER THE ACTIONS OF THE APPELLATE COURTS OF THE STATE OF NORTH CAROLINA AFFIRMING SANCTIONS AGAINST THE PETITIONER BY THE TRIAL COURT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

I. THE ACTIONS OF THE APPELLATE COURTS OF THE STATE OF NORTH CAROLINA AFFIRMING DISMISSAL OF THE PETITIONER'S CLAIMS DID NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Respondents contend the Petitioner's Petition for Writ of Certiorari does not present any legitimate federal questions cognizable by this court, especially regarding the dismissal of the Petitioner's complaint pursuant to summary judgment.

Under N.C. Gen. Stat. 1A-1, Rule 56(c) (1990), summary judgment shall be granted "if pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."

At the time of the broadcasts complained

of, Petitioner was voluntarily serving as Medical Director at a nursing home which was then the subject of several lawsuits. All the lawsuits referred to in the broadcasts were a matter of public record. Respondents in this action offered Petitioner the opportunity to make a statement on the air in regard to the lawsuits surrounding University Nursing Center.

At the summary judgment hearing, the Court considered all pleadings filed by both parties, depositions of Roy Hardee and Lonnie Butler, affidavits of Hardee and Petitioner, the videotapes of the allegedly defamatory newscasts and the arguments of the parties. The trial court concluded that broadcasts were protected by absolute or qualified privilege.

Under Article I, § 14 of the North Carolina Constitution, "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse." This section of our Constitution is considered under the doctrine of "qualified

privilege." Johnston v. Time, Inc., 321 F. Supp. 837, (M.D.N.C. 1970), aff'd in part and rev'd in part, 448 F.2d 378 (4th Cir. 1971). Whether or not a publication has a qualified privilege is a question of law for the trial court. Towne v. Cope, 32 N.C.App. 660, 233 S.E.2d 624 (1977).

This Court has held that defamation of a public figure requires "actual malice." New York Times Co. v. Sullivan, 376 U.S. 254 (1964). In order to establish actual malice, Petitioner must provide clear and convincing proof that the alleged defamatory statements were published with knowledge that they were false or with reckless disregard of the truth. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52, 91 S.Ct. 1811, 1824, 29 L.Ed.2d 296, 316-17 (1971).

There is no evidence that Respondents exhibited any evidence of reckless disregard for the truth or falsity of the allegations. In fact, the broadcasts appear to have been factually correct. The record shows that these news broadcasts were the result of an ongoing

investigation into the problems of University Nursing Center publicly reported by other newsmedia. Petitioner acknowledges, and the record reflects, that Respondents offered Petitioner and his superiors many opportunities to make a statement concerning the allegations.

This Court stated in Time, Inc. v. Hill, 385 U.S. 374 (1967):

> We believe that we will create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter. Time, Inc. v. Hill, 385 U.S. 374, 389 (1967) (emphasis added).

It is submitted that the decision of the North Carolina Court in the present action resulting in dismissal of Petitioner's claims is in full and complete conformity with the decisions of the Supreme Court of the United States.

II. THE ACTIONS OF TRIAL COURT WHICH WERE UPHELD BY THE APPELLATE COURTS OF THE

STATE OF NORTH CAROLINA IN AWARDING SANCTIONS AGAINST THE PETITIONER DID NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Again, the Respondents submit that no Federal question exists regarding the sanctions imposed against the Petitioner by the North Carolina trial court. Petitioner filed his amended complaint on 10 February 1987, which was virtually identical to the original complaint. Under Rule 11 of the N.C. Rules of Civil Procedure (effective 1 January 1987),

> (a) Signing by Attorney. -- .
>
> ....A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address.....The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of

> ligation.....If a pleading, motion, or other paper is signed in violation of this rule, the Court, upon motion or upon its own initiative, shall impose upon the person who signed it,...., an appropriate sanction, which may include an order to pay to the other party...., including a reasonable attorney's fee.

N.C. Gen. Stat. 1A-1, Rule 11(a) (1988 Cum. Supp.). Under North Carolina's Rules of Civil Procedure (Rule 11(a)), the trial court does not need to conclude that an attorney or other party has shown subjective bad faith. Turner v. Duke University, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989) (citations omitted).

In its order dated 10 June 1990, the trial court found as fact:

> 7. That the file in this matter is voluminous exhibiting that conscientious efforts were made on behalf of the Respondents by the Respondents' counsel;
>
> 8. That this ligation was very technical and included multiple depositions, multiple sets of interrogatories, numerous hearings on various motions, all of which required counsel for the Respondents to expend numerous hours in court appearances, deposition appearances, research, and preparation for court appearances;
>
> 9. That since February 22, 1987, the

> Respondents have incurred legal expenses in the amount of $13,450.00;
>
> 10. That the evidence in this case points to the fact that the amended complaint in this matter was under the law spurious and without foundation;
>
> 11. That the complaint was in fact a sham on the court and was not filed in good faith....

CONCLUSION

First, the Respondents respectfully move the Supreme Court of the United States to deny the Petition for Writ of Certiorari filed herein by the Petitioner, on the following grounds:

1. That the Petitioner maintains no appeal of right from the Supreme Court of North Carolina by virtue of the fact that the case does not directly involve a substantial question arising under the Constitution of the United States and the failure of the Petitioner to properly and timely raise any legitimate constitutional issue or to advance any argument or cite any case authority regarding any constitutional issue if, in fact, any exists.

That, in fact, several defenses were raised by the Respondents in the trial court, any one of which was sufficient to sustain a judgment for Respondents, as recognized by the Court of Appeals of North Carolina.

2. That this pro se civil action was filed in 1986. For the past five years Petitioner has wasted the judicial time and resources of the State of North Carolina and put Respondents to unwarranted legal expenses, while he sought damages for nothing more than the Respondents' failure to report the news the way that Petitioner wanted it reported. As is amply illustrated by his two hundred ninety-eight page Record on Appeal in North Carolina, Petitioner has had his day in Court, and much more. The North Carolina Court of Appeals' opinion deals fully and fairly with every point raised by Petitioner in this frivolous appeal, and Respondents rely upon the well-reasoned, unanimous opinion of the North Carolina Court of appeals as their response to the Petition for Writ of Certiorari.

Second, in the event the Court denies the Petition for Writ of Certiorari, the Respondents move the Court, pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States, to award Respondents damages and double costs.

Respectfully submitted this 6th day of August, 1991.

POYNER & SPRUILL

By: James T. Cheatham
James T. Cheatham

By: Ernie K. Murray
Ernie K. Murray
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